

No. 12054

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United States  
Court of Appeals  
for the Ninth Circuit

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PACIFIC PORTLAND CEMENT COMPANY,  
a corporation,

Appellant,

VS.

WESTVACO CHLORINE PRODUCTS COR-  
PORATION, a corporation,

Appellee.

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Transcript of Record

(In Three Volumes)

VOLUME I

(Pages 1 to 456, inclusive)

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Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

FEB 16 1949

PAUL P. O'BRIEN,



No. 12054

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Court of Appeals

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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit in Support of Application for Extension of Time to File Record on Appeal (USCA) .....	1317
Amendment to Reply to Counterclaims.....	37
Answer .....	17
Appeal:	
Application for Extension of Time to File Record on (USCA) .....	1314
Bond for Costs on.....	77
Certificate of Clerk to Transcript of Record on .....	85
Designation of Contents of Record on (DC)	79
Designation of Contents of Record on (USCA) .....	1326
Notice of .....	74
Order Extending Time for Filing Record and Docketing (DC) .....	83
Order Extending Time for Filing Record and Docketing (USCA) .....	84, 1319
Order for Consideration of Exhibits in Original Form on (USCA) .....	1325

Appeal (Cont.)

Statement of Points on Which Appellant Intends to Rely on (USCA) .....	1319
Stipulation for Consideration of Exhibits in Original Form on (USCA) .....	1324
Stipulation for Transmissal of Original Exhibits on (DC) .....	82
Stipulation for Extension of Time to File Record and Docket (USCA) .....	1316
Application for Extension of Time to File Record on Appeal and to Docket Appeal (USCA) .....	1314
Bond for Costs on Appeal.....	77
Certificate of Clerk to Transcript of Record on Appeal .....	85
Complaint .....	2
Exhibit A—Agreement, Jan. 29, 1937, by and between Pacific Portland Cement Co. and California Chemical Co. ....	8
Designation of Contents of Record on Appeal (DC) .....	79
Designation of Parts of Record Necessary for Consideration (USCA) .....	1326
Findings of Facts and Conclusions of Law....	47
Judgment .....	63
Memorandum of Points and Authorities.....	15
Motion and Notice of Motion for Order for Deposit in Court .....	13

### iii.

	PAGE
Names and Addresses of Attorneys.....	1
Notice of Appeal .....	74
Opinion, Memorandum .....	67
Order Extending Time to File Record on Appeal and Docket Action (DC).....	83
Order Extending Time to File Record on Appeal and Docket Action (USCA).....	84, 1319
Order for Consideration of Exhibits in Original Form (USCA) .....	1325
Order for Deposit in Court.....	16
Order for Entry of Judgment.....	41
Order for Refund Out of Deposit and for Reduction of Further Deposits .....	36
Order re Payments under Contract and re Stay of Judgment, Stipulation and .....	43
Order Shortening Time .....	15
Reply to Counterclaims .....	34
Amendment to .....	37
Statement of Points on Which Appellant Intends to Rely on Appeal (USCA).....	1319
Stipulation and Order re Payments under Contract and re Stay of Judgment.....	43
Stipulation for Compromise and Dismissal of First Counterclaim .....	39
Stipulation for Consideration of Exhibits in Original Form (USCA) .....	1324

Stipulation for Extension of Time for Filing Record and Docketing Appeal (USCA) . . .	1316
Stipulation for Transmissal of Original Ex- hibits on Appeal (DC) . . . . .	82
Transcript of Testimony and Proceedings . . .	86
Exhibits for Defendant:	
A—Letter, Jan. 29, 1944, Westvaco Chlorine Products Corp. to Pacific Portland Ce- ment Co. . . . .	351
B—Letter, Jan. 18, 1944, Pacific Portland Cement Co. to Westvaco Chlorine Prod- ucts Co. . . . .	347
C—Revised Tabulation showing 72c increase in Cost of Production and Resulting Price of \$4.48 . . . . .	415
D—Westvaco — Comparative Production Costs—Adjusted—July 1944 and June 1945 with July 1945 and June 1946 . . .	419
E—Letter, Sept. 23, 1946, Westvaco to Pa- cific Portland Cement Co. . . . .	426
F—Letter, Nov. 24, 1947, to Pillsbury, Madi- son & Sutro . . . . .	439
G—Contract dated Jan. 29, 1937, between Pacific Portland Cement Co. and Cali- fornia Chemical Co. . . . .	751
H—Copy of Letter dated Sept. 18, 1936, Cali- fornia Chemical Co. to Mr. Colton . . . .	881
J—Document Showing Production and Sales, Magnesia and Gypsum, 1938-1946 . . . .	920

## Exhibits for Defendant—(Cont'd)

K—Report of Production for Weeks ending Sept. 6, 13 and 20, 1946.....	1073
L—Laboratory Report, Oct. 20, 1947, N. R. Dunbar to F. Melhase. Subject: Produc- tion of Gypsum from Unacidified Bit- tern .....	1246
M—Yellow Sheet Containing Figures on Ethylene-Dibromide Production .....	1173

## Exhibits for Plaintiff:

1—Letter, Oct. 2, 1941. O. H. Hurlbert to Pacific Portland Cement Co.....	100
2—Letter from Westvaco to Portland Pa- cific Cement Co., Jan. 14, 1944.....	120
3—Magazine Article by Dr. Seaton.....	129
4 Letter, Feb. 4, 1944, C. Bruce Flick to Westvaco .....	152
5—Letter, June 5, 1936, Stanley H. Barrows to Pacific Portland Cement Co.....	164
6—Letter, Feb. 28, 1944, C. Bruce Flick to W. K. Wallace .....	189
7—Letter, March 2, 1944, Westvaco to Pa- cific Portland Cement Co., S. F.....	193
8—Letter, March 11, 1944, Pacific Portland Cement Co., to Westvaco Chlorine Prod- ucts Co., Attn. Max Y. Seaton, and let- ter addressed to same parties on same date .....	200

	PAGE
Exhibits for Plaintiff—(Cont'd)	
9—Letter, March 13, 1944, Dr Seaton to Pacific Portland Cement Co., Attn. Mr. Flick .....	203
10—Letter, Sept. 13, 1946, Westvaco by Mr. Wallace to Pacific Portland Cement Co.	220
11—Letter, Sept. 13, 1946, Mr. Flick to Mr. Wallace .....	223
12—Letter, Sept. 13, 1946, Mr. Flick to Mr. Wallace .....	226, 227
13—Letter, Nov. 4, 1946, Mr. Flick to Mr. Wallace .....	233
14—Letter, Dec. 11, 1946, Pacific Portland Cement Co. to Westvaco.....	256
15—Exhibit F to Reply to Interrogatories Propounded to Defendant—List representing the Items and the Basis for the Claim that such Items according to Defendant's Contention Constitute Items of Cost of Manufacture or Cost of Production of Gypsum .....	276
17—Exhibit E to Defendant's Answer to Interrogatories—Showing Claim and Representation and Statement of Defendant as to Claimed or Alleged Items of Cost of Manufacture for year 1943 over the year 1942 .....	557
18—Westvaco Charges Per Books to Cost of Production of Gypsum .....	565

## Exhibits for Plaintiff—(Cont'd)

19—Letter, 10/31/46, Westvaco, by D. D.  
Watt to Pacific, C. B. Flick..... 608

20—Letter, 10/31/46, Westvaco, by D. D.  
Watt to Pacific, C. B. Flick..... 609

## Opening Statement on behalf of:

Defendant ..... 1280

Plaintiff ..... 1251

## Witnesses for Defendant:

## ✓ Alexander, DeWitt

—direct ..... 1174

—cross ..... 1186

—redirect ..... 1196

## ✓ Barrows, Stanley H.

—direct ..... 742

—cross ..... 770, 869

## ✓ Farquhar, Francis P.

—direct ..... 1108

—cross ..... 1117

## ✓ Maxwell, George A.

—direct ..... 1134

—cross ..... 1146

—redirect ..... 1167



## Witnesses for Defendant—(Cont'd)

## ✓ Melhase, Fred

—direct .....	799
—cross .....	815
—recalled, cross .....	862
—redirect .....	856, 866
—recross .....	859, 867

## ✓ Wallace, William K.

—direct .....	1064, 1070
—cross .....	1082
—redirect .....	1094
—surrebuttal, direct .....	1247
—cross .....	1248

## ✓ Watt, David

—direct .....	878, 914
—cross .....	937, 960
—recalled, cross .....	1027
—redirect .....	1053
—recross .....	1058

## Witnesses for Plaintiff:

## ✓ Colton, James H.

—rebuttal, direct .....	1095
—cross .....	1096
—redirect .....	1104

## ✓ Draewell, Walter G.

—direct .....	621
—cross .....	622



## Witnesses for Plaintiff—(Cont'd)

## ✓ Flick, C. Bruce

—direct .....	87
—recalled, direct ....	94, 151, 168, 222
—cross .....	303, 423, 464
—redirect .....	584
—recross .....	612

## ✓ Jackson, J. Hugh

—rebuttal, direct .....	1197
—cross .....	1205

## ✓ Kaapcke, Wallace

—direct .....	87
—cross .....	89

## ✓ Kleckner, William R.

—rebuttal, direct .....	1224
—cross .....	1226
—redirect .....	1229, 1230
—recross .....	1230

## ✓ Pryor, O. Kenneth

—direct .....	633, 655
—cross .....	664
—redirect .....	708, 731
—recross .....	715

## Webster, Paul K.

—direct .....	493
—cross .....	522
—redirect .....	555
—recross .....	582



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In the District Court of the United States for the  
Northern District of California, Southern Division

Civil No. 26934-R

PACIFIC PORTLAND CEMENT COMPANY,  
a California Corporation,

Plaintiff,

vs.

WESTVACO CHLORINE PRODUCTS CORPORATION, a Corporation,

Defendant.

COMPLAINT FOR DECLARATORY AND  
OTHER RELIEF

Plaintiff above named complains of defendant and alleges:

1. Plaintiff is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California. [1\*]

2. Defendant is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and qualified under the laws of the State of California to do business therein, and has designated an agent in the City and County of San Francisco and within this district upon whom process may be served herein.

3. The value of the matter involved in this suit is in excess of the sum of \$3,000, exclusive of interest and costs, and because of the diversity of citizenship between plaintiff and defendant, plain-

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

tiff has elected to commence this action in the District Court of the United States for the Northern District of California, Southern Division.

4. On or about the 29th day of January, 1937, plaintiff entered into a written contract with California Chemical Company, a corporation. A true copy of said contract is attached hereto marked "Exhibit A," and by this reference is incorporated herein. In or about the month of March, 1937, defendant, with plaintiff's written consent, succeeded to all the rights and obligations under said agreement of said California Chemical Company.

5. A controversy has existed and does now exist between defendant and plaintiff as to the provisions of the aforementioned contract and the rights and obligations of the parties thereunder, to the extent and in the manner hereinafter alleged.

6. In August, 1941, defendant notified plaintiff that, effective October 5, 1941, the price of gypsum was increased under paragraph (6) of said contract to \$2.98 per ton, by reason of an alleged increase of 18 cents per ton in defendant's cost of production of gypsum. Plaintiff was and [2] is without knowledge whether defendant's cost of production of gypsum actually had so increased; nevertheless, commencing October 5, 1941, paid defendant \$2.98 per ton for gypsum delivered under said contract.

7. On or about January 14, 1944, defendant notified plaintiff that, effective March 15, 1944, the price of gypsum would be increased under para-

graph (6) of said contract to \$3.76 per ton, by reason of a further alleged increase of 78 cents per ton in defendant's cost of production of gypsum.

On information and belief plaintiff alleges that if defendant's cost of production of gypsum had further increased at all it had so increased not more than 29 cents per ton, and that pursuant to paragraph (6) of said contract defendant was entitled to be paid not more than \$3.27 per ton for gypsum delivered under said contract on and after March 15, 1944. Plaintiff protested said purported increase to \$3.76 per ton and under such protest paid defendant \$3.76 per ton for gypsum delivered under said contract from September 4, 1946, to and including November 12, 1946. On information and belief, plaintiff alleges that said payments were in excess of the price properly chargeable by defendant under said contract by not less than 49 cents per ton, or a total sum of not less than \$2,494.59.

8. On or about September 13, 1946, defendant notified plaintiff that, effective November 13, 1946, the price of gypsum was increased under paragraph (6) of said contract to \$4.48 per ton, by reason of an alleged additional increase of 72 cents per ton in defendant's cost of production of gypsum.

On information and belief plaintiff alleges that if defendant's cost of production of gypsum had increased at all [3] it had increased not more than an additional 25 cents per ton, and that pursuant to paragraph (6) of said contract defendant was

entitled to be paid not more than \$3.52 per ton for gypsum delivered under said contract on and after November 13, 1946. Plaintiff protested said purported increase to \$4.48 per ton and under such protest paid defendant \$4.48 per ton for gypsum delivered under said contract from November 13, 1946, to and including January 31, 1947. On information and belief plaintiff alleges that said payments were in excess of the price properly chargeable by defendant under said contract by not less than 96 cents per ton, or a total sum of not less than \$6,911.34.

9. Plaintiff alleges on information and belief that defendant has erroneously construed the term "cost of production" as used in paragraph (6) of said contract and continues to do so, and defendant has erroneously, and through the use of improper accounting and other methods, determined its cost of production of gypsum. Plaintiff further alleges that in violation of said contract defendant has refused plaintiff access to defendant's books of account and records showing its production cost of gypsum.

For a Second, Separate and Distinct cause of action against defendant plaintiff alleges:

1. Plaintiff repeats and incorporates herein the allegations contained in paragraphs 1 to 5, inclusive, of plaintiff's first cause of action.

2. Pursuant to paragraph (5) of said contract plaintiff has from time to time made deductions from the price of gypsum sold to plaintiff thereunder, by reason of the failure of various lots of



said gypsum to conform within 2 per cent in gypsum content to the chemical analysis and specifications set [4] forth in said contract. Defendant has asserted and now asserts that deductions so made by plaintiff in the total amount of \$8,985.02 were not authorized by paragraph (5) of said contract and defendant has demanded that plaintiff pay said sum of \$8,985.02 to defendant. Plaintiff alleges that said assertions by defendant are erroneous.

For a Third, Separate and Distinct cause of action against defendant plaintiff alleges:

1. Plaintiff repeats and incorporates herein the allegations contained in paragraphs 1 to 5, inclusive, of plaintiff's first cause of action.

2. On or about October 6, 1946, defendant notified plaintiff under paragraph (3) of said contract that defendant intends to produce in excess of 20,000 tons of gypsum in the calendar year 1947. Plaintiff did not elect under said paragraph (3) to refuse to purchase and accept the excess and therefore gave defendant no notice of refusal. Defendant now claims that, by waiving its right to refuse to purchase and accept such excess over 20,000 tons in the calendar year 1947, plaintiff also waived its right to refuse to purchase and accept in excess of 2,000 tons of gypsum in any one month in 1947. Plaintiff claims that its right to refuse to purchase and accept in excess of 2,000 tons in any one month is separate and distinct from its right to refuse to purchase and accept in excess of 20,000 tons in any one calendar year, and that plaintiff still has the right to refuse to purchase and



accept in excess of 2,000 tons of gypsum in any one month in 1947.

Wherefore, plaintiff prays judgment against defendant as follows:

1. That the court declare the rights and other legal [5] relations of the plaintiff and the defendant created by the aforesaid contract dated January 29, 1937, and in particular that the court (a) construe the term "cost of production" as used in paragraph (6) of said contract and declare the proper method of determining such cost of production; (b) declare that the deductions made by plaintiff from the price of gypsum by reason of its failure to conform to the required specifications, were proper, and declare the proper method of determining the conformity or nonconformity of gypsum to said specifications; and (c) declare that plaintiff's rights of refusal under paragraph (3) of said contract are separate and distinct.

2. That plaintiff have judgment against defendant for the sum of nine thousand four hundred five and ninety-three hundredths dollars (\$9,405.93), and for plaintiff's costs and disbursements herein.

3. That plaintiff have such other and further relief as to this court may seem meet and proper in the premises.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,  
/s/ MAURICE D. L. FULLER,  
/s/ WALLACE L. KAAPCKE,  
Attorneys for Plaintiff. [6]

EXHIBIT A  
AGREEMENT

This Agreement, made this 29th day of January, 1937, by and between Pacific Portland Cement Company, a California corporation, hereinafter called "Pacific," a party of the first part, and California Chemical Company, a Delaware corporation, hereinafter called "California," party of the second part,

Witnesseth:

Whereas California contemplates the erection of a plant located on Canal Head at Newark, California, primarily designed to produce magnesium oxide in its various forms, which plant will produce as a by-product substantial quantities of gypsum, and

Whereas Pacific is desirous of purchasing from California certain of the gypsum produced at said plant;

Now, Therefore, the parties hereto, in consideration of the mutual promises and covenants herein contained, promise and agree as follows, to wit:

(1) California agrees that it will sell and deliver to Pacific, and Pacific agrees that it will purchase and receive from California, the entire output of by-product gypsum produced by California at its said plant in excess of California's requirements for use or sale of gypsum for chemical, pharmaceutical, or scientific purposes, which requirements of California shall not exceed four thousand (4,000)

tons per annum. It is the intent of this agreement that Pacific will purchase from California, and California will sell to Pacific, all gypsum produced at said plant which may be available for any use for agricultural, building, or construction purposes, or any other commercial purpose other than for chemical, pharmaceutical or scientific purposes.

(2) This agreement shall apply to all gypsum produced at said plant up to January 31, 1962; provided, however, that at any [7] time during the first two (2) years of this agreement, upon the giving of written notice by Pacific to California, this agreement may be cancelled by Pacific, and that at any time after the first two (2) years Pacific may cancel this agreement on the giving of one year's written notice to California.

(3) Pacific agrees that it will purchase and accept shipments of gypsum so produced in approximately equal monthly quantities. California agrees that on or before the fifteenth day of each month it will notify Pacific in writing of the amount of gypsum which it proposes to produce during the succeeding calendar month, and Pacific shall have the right to refuse to purchase and accept in excess of two thousand (2,000) tons in any one month, such refusal to be exercised in writing on or before the first day of the calendar month during which gypsum in excess of two thousand (2,000) tons per month is to be produced.

California further agrees that it shall give Pa-

cific three (3) months' notice in writing of its intention to produce in excess of twenty thousand (20,000) tons of gypsum in any one calendar year, and Pacific shall have the right to refuse to purchase and accept in excess of twenty thousand (20,000) tons in any one calendar year, such refusal to be exercised in writing within thirty (30) days after receipt of notice from California.

In the event that Pacific shall exercise its right to refuse to purchase and accept in excess of two thousand (2,000) tons in any one month, or twenty thousand (20,000) tons in any one year, then and in that event California shall have the right to sell the amount so refused for any purpose whatsoever.

(4) Pacific shall pay California for said gypsum two and eighty hundredths dollars (\$2.80) per net ton of two thousand (2,000) pounds loaded bulk on board cars at the plant of California at Newark, California. Payments shall be made on the fifteenth day of the month for gypsum loaded during the preceding month. [8]

(5) In the event that any gypsum ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) tendered to Pacific hereunder shall not be within two per cent (2%) in gypsum ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) content of, or if it shall not conform to, the chemical analysis and specification attached hereto, marked Exhibit "A," and hereby made a part hereof, then and in that event Pacific shall have the option as to any such gypsum ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) either to (1) refuse to accept and pay for such gypsum ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ), or (2) accept such gypsum

( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) and pay therefor ten cents (10c) per ton less than the price provided for in paragraph (4) above for each per cent which the said gypsum ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) falls below the said chemical analysis in gypsum ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) content.

(6) In the event that California's cost of production of gypsum for any twelve (12) months' period during the term hereof shall increase five per cent (5%) above its average cost of production of gypsum for the preceding twelve (12) months' period, then and in that event California shall have the right, upon giving sixty (60) days' written notice to Pacific, to increase the price payable hereunder for gypsum thereafter delivered hereunder in an amount not to exceed the "actual advance in California's cost of manufacture"; provided that in no event may more than one such increase be made in any one calendar year.

California shall keep books of account and records showing its production cost of gypsum, and such books of account and records relating to the production cost of gypsum shall be open to inspection to Pacific at all reasonable times in order to enable Pacific to confirm the correctness of any advance in price permissible under this paragraph.

(7) All new or additional state or federal taxes levied subsequent to the date hereof on the sales covered by this agreement shall be added by California to the sales price and paid to California by Pacific. [9]

(8) This agreement shall bind and inure in



favor of the parties hereto, their respective successors and assigns. California is hereby given the express right to assign this agreement to any corporation of equal financial responsibility with California, or which may operate the plant contemplated to be operated hereunder, with substantially the same properties and plant; otherwise California shall have no right to assign this agreement or any of its rights or obligations hereunder without the written consent of Pacific.

In Witness Whereof, the parties hereto have caused these presents to be executed as of the day and year first hereinabove written.

PACIFIC PORTLAND

CEMENT COMPANY,

By /s/ ROBT. B. HENDERSON,

President.

/s/ A. H. CANVIN,

Secretary.

CALIFORNIA CHEMICAL

COMPANY,

By /s/ WILLIAM V. WILLIAMS,

Vice President. [10]

## EXHIBIT "A"

## GYPSUM ANALYSIS AND SPECIFICATION

The gypsum ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) purchased under this contract shall conform to the following analysis:

Silica .....	$\text{SiO}_2$	.06
Ferric oxide.....	$\text{Fe}_2\text{O}_3$	.06
Aluminum oxide.....	$\text{Al}_2\text{O}_3$	.02
Calcium oxide.....	$\text{CaO}$	32.32
Magnesium oxide.....	$\text{MgO}$	.29
Sulphur trioxide.....	$\text{SO}_3$	45.89
Ignition loss. Comb.....	$\text{H}_2\text{O} + \text{CO}_2$	20.70
		<hr/> 99.34%

Combined water content = 20.40%.

Gypsum content ( $\text{CaSO}_4 \cdot 2\text{H}_2\text{O}$ ) calculated from Combined water = 97.51%.

Methods of analysis shall conform with the A.S.T.M. "Standard Methods for Testing Gypsum and Gypsum Products" No. C-26-33; except that free moisture shall be determined by drying at room temperature to constant weight.

Free moisture shall not exceed 1%. Water soluble salts Other than  $\text{CaSO}_4$  shall not exceed 0.4%.

[Endorsed]: Filed Feb. 27, 1947. [11]

[Title of District Court and Cause.]

## MOTION AND NOTICE OF MOTION FOR ORDER FOR DEPOSIT IN COURT

To Westvaco Chlorine Products Corporation, and  
Messrs. Bacigalupi, Elkus & Salinger, its Attorneys:

You and each of you will please take notice that on [12] the 14th day of March, 1947, in Room 268, United States Post-Office and Court-House Building, Seventh and Mission Streets, San Francisco, at 10 o'clock a.m. of that day, or as soon thereafter

as counsel can be heard, the undersigned will move the above-entitled court as follows:

1. To order the deposit with the court of the sum of 96 cents per ton for all gypsum sold and delivered after January 31, 1947, by defendant to plaintiff under the contract attached as "Exhibit A" to the complaint on file herein, the deposits relating to gypsum delivered in each month commencing with the month of February, 1947, to be paid into court on or before the 15th day of the succeeding month; such deposits to continue until further order of the court;

2. To order that upon making such deposits, and upon paying to defendant, as provided in said contract, the balance of the price per ton of gypsum claimed by defendant, to wit \$4.48 per ton, less any deductions under paragraph (5) of said contract, plaintiff shall be deemed to have fully performed its obligations of payment with respect to each month's deliveries of gypsum covered by each deposit and payment so made.

Annexed hereto is a draft of the form of order sought by plaintiff upon this motion.

Said motion will be based upon this notice and the papers filed herewith, and upon the complaint on file in the above-entitled cause.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

(Acknowledgment of Receipt of Copy.) [13]



[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND  
AUTHORITIES

There is in controversy between plaintiff and defendant, inter alia, the sum of 96 cents per ton of gypsum delivered to plaintiff by defendant, as set forth in the first cause of action [14] in the complaint. Part of the relief sought in the action is the disposition of this sum.

In such a case, upon notice to the parties and by leave of court, a party may deposit the sum in dispute with the court.

(Rule 67, Federal Rules of Civil Procedure  
(28 U.S.C.A. following section 723(c)).

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE.

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 11, 1947. [15]

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[Title of District Court and Cause.]

ORDER SHORTENING TIME

Upon the ex parte application of plaintiff, and good cause appearing therefor, it is hereby

Ordered that the provisions of Rule 6(d) of the Federal Rules of Civil Procedure and of Rule 7(d)

of the Rules of Practice [16] of this court for the hearing of motions upon five days' notice are hereby dispensed with for the purposes of hearing plaintiff's motion for an order for deposit in court, a copy of which is attached hereto, and the 14th day of March, 1947, at 10 o'clock a.m. is hereby fixed as the time for hearing said motion.

Dated: March 11, 1947.

/s/ MICHAEL J. ROCHE,  
United States District Judge.

[Endorsed]: Filed Mar. 11, 1947. [17]

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[Title of District Court and Cause.]

### ORDER FOR DEPOSIT IN COURT

Upon motion of the plaintiff coming regularly on for hearing this 14th day of March, 1947, and good cause appearing therefor, it is hereby Ordered:

1. That on or before the 15th of each month, commencing on March 15, 1947, plaintiff, Pacific Portland Cement Company, shall deposit with the court the sum of 96 cents per ton for all gypsum sold and delivered to it during the preceding calendar month by defendant, Westvaco Chlorine Products Corporation, under the contract attached as "Exhibit A" to the complaint on file herein. Such deposits shall continue until the further order of the court, and the fund accumulated in the hands

of the court by such deposits shall be held subject to the further order of the court.

2. Upon making such deposits, and upon paying to defendant, as provided in said contract, the balance of the price per ton of gypsum claimed by defendant, to wit, \$4.48 per ton, less any deductions under paragraph (5) of said contract, plaintiff shall be deemed to have fully performed its obligations of payment with respect to each month's deliveries of gypsum covered by each deposit and payment so made.

3. Nothing in this order contained is intended to preclude any price change or changes pursuant to and in accordance with the provisions of paragraph (6) of said contract during the pendency of this action, and in the event of any such change the court reserves jurisdiction to amend this order appropriately.

Done in open court, this 14th day of March, 1947.

MICHAEL J. ROCHE,  
United States District Judge.

[Endorsed]: Filed Mar. 14, 1947. [18]

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[Title of District Court and Cause.]

### ANSWER

Now comes Westvaco Chlorine Corporation, a corporation, the defendant above-named, and answering plaintiff's complaint herein alleges as follows:

## FIRST DEFENSE TO FIRST COUNT

1. Admits the allegations contained in paragraph 4 of the complaint, except that defendant denies that the instrument attached to the complaint marked "Exhibit A" is a valid contract.

2. As to the allegations contained in paragraph 5 of the complaint, admits that a controversy has existed and does now exist between defendant and plaintiff as to the provisions of the said alleged agreement and the rights and obligations of the parties thereunder to the extent and in the manner in said complaint alleged, except as the allegations of said complaint are herein denied.

3. As to the allegations contained in paragraph 6 of the complaint, denies that plaintiff was and/or is without knowledge that defendant's cost of production actually had increased 18c per ton, and in this regard, defendant alleges that in August, 1941, plaintiff was furnished by defendant with complete and detailed information, confirming that defendant's cost of production actually had increased at least 18c per ton, which increase was duly accepted by plaintiff. Defendant admits that plaintiff paid defendant at the rate of \$2.98 per ton commencing October 5, 1941, for gypsum delivered under said alleged agreement, except for certain so-called moisture credit deductions made by plaintiff, a portion of which were improperly made, all as hereinafter averred.

4. As to the allegations of paragraph 7 of said complaint, defendant admits that on or about January 14, 1944, defendant notified plaintiff that, ef-

fective March 15, 1944, the price of gypsum would be increased under paragraph 6 of said alleged agreement to \$3.76 per ton by reason of a further increase of 78c per ton in [19] defendant's cost of production of gypsum; defendant further admits that plaintiff duly paid defendant at the rate of \$3.76 per ton for gypsum delivered under said alleged agreement from September 4, 1946, to and including November 12, 1946, except for certain so-called moisture credit deductions made by plaintiff, a portion of which were improperly made by plaintiff, all as hereinafter averred. Except as hereinabove expressly admitted, defendant denies specifically and generally, each and every, all and singular, the allegations of said paragraph 7 both conjunctively and disjunctively. In this respect defendant avers that defendant's cost of production of gypsum actually had increased 78c per ton and that pursuant to paragraph 6 of said alleged agreement, defendant was entitled to be paid \$3.76 per ton for gypsum delivered under said alleged agreement on and after March 15, 1944. Defendant denies that the payments or any of them made by plaintiff to defendant as in said paragraph 7 alleged were in excess of the price properly chargeable by defendant to plaintiff under said alleged agreement in any amount whatsoever or at all.

5. Answering the allegations of paragraph 8 of said complaint, defendant admits that on or about September 13, 1946, defendant notified plaintiff that, effective November 13, 1946, the price of gypsum was increased under paragraph 6 of said alleged agreement of \$4.48 per ton by reason of an addi-



tional increase of at least 72c per ton in defendant's cost of production of gypsum; defendant further admits that plaintiff paid defendant \$4.48 per ton for gypsum delivered under said alleged agreement from November 13, 1946, to and including January 31, 1947. Except as hereinabove expressly admitted, defendant denies specifically and generally, each and every, all and singular, the allegations of said paragraph 8, both conjunctively and disjunctively. In this respect, defendant avers that defendant's cost of production of gypsum actually increased at least 72c per ton, and that pursuant to paragraph 6 of said alleged agreement, defendant was entitled to be paid \$4.48 per ton for gypsum delivered under said alleged agreement on and after November 13, 1946. Defendant denies that the payments or any of them made by plaintiff to defendant as in said paragraph 8 of the complaint alleged, were in excess of the [20] price properly chargeable by defendant under said alleged agreement in any amount whatsoever or at all.

6. Defendant denies that it has erroneously construed the term "cost of production" as used in paragraph 6 of said alleged agreement and/or continues to do so; defendant further denies that through the use of improper accounting and/or other methods or otherwise or at all, defendant has erroneously determined its cost of production of gypsum; defendant further denies that in violation of said alleged agreement defendant has refused plaintiff access of defendant's books of accounts and records, showing its production cost of

gypsum. Defendant admits that it has denied plaintiff access to certain portions of and entries in defendant's books of account and records not properly the subject of inspection by plaintiff for the reason that such entries and records contain detailed information of a confidential and secretive nature and are trade secrets; defendant has offered to plaintiff to permit a reputable, disinterested, independent certified public accountant to inspect said entries and records to ascertain the ultimate facts therein set forth, divorced from said trade secrets, and to convey to plaintiff any and all such ultimate information therein contained pertaining to defendant's cost of producing gypsum, of which offer plaintiff has failed to avail itself or take advantage thereof.

## SECOND DEFENSE TO FIRST COUNT

As a second, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That said alleged agreement referred to in plaintiff's complaint and attached as "Exhibit A" thereto, is void for want of consideration, lack of mutuality, and is not a valid contract.

## THIRD DEFENSE TO FIRST COUNT

As a third, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That said alleged agreement referred to in plaintiff's complaint and [21] attached as "Exhibit A"

thereto, is ineffective and void in that all the essential terms of a contract of sale and to sell personal property in excess of \$500.00 are not in writing, as required by Section 1724 of the Civil Code of the State of California, in that essential terms of a contract of sale and to sell personal property, to wit, the price and the quantity of merchandise sold or to be sold, are not set forth in definite, ascertainable terms, and the purported price and quantity are so vague, indefinite, and uncertain as to be nugatory, void, and unenforceable.

#### FOURTH DEFENSE TO FIRST COUNT

As a fourth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the said alleged agreement referred to in plaintiff's complaint and attached as "Exhibit A" thereto, is ineffective, void, and unenforceable for the reason that essential provisions thereof, to wit, the price and quantity of merchandise sold or to be sold, are not set forth with certainty and definiteness.

#### FIFTH DEFENSE TO FIRST COUNT

As a fifth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the plaintiff is estopped and has waived any right that it might otherwise have had to deny that the expression "cost of production," as said expression is used in paragraph 6 of said alleged



agreement, means and was intended by the parties to said alleged agreement to mean the cost of production as derived and used by defendant from time to time; that in August, 1941, defendant notified plaintiff of an increase in price, pursuant to paragraph 6 of said alleged agreement, because of an increase in its cost of production of gypsum; that thereafter plaintiff questioned a portion of said increase in price, whereupon, plaintiff was furnished with information and data substantiating said price increase and disclosing the method employed by defendant in computing its said cost of production. Thereafter plaintiff duly accepted said price increase and computation and paid defendant for gypsum sold and delivered at said increased price without protest; [22] that in deriving its cost of production, as aforesaid, defendant included indirect costs, including overhead, and at all times since has contended and does now assert that such indirect costs are properly includable in the cost of production of gypsum, as said term is used in said alleged agreement; plaintiff on the other hand asserts that such indirect costs are not properly includable in such cost of production. That in reliance upon plaintiff's acceptance of said price increase in 1941 and the method employed by defendant in deriving the same, to wit, the inclusion of indirect costs, defendant did from time to time expend substantial sums of money in expanding and improving its facilities for the production of gypsum; that had defendant anticipated

that plaintiff would at any time question defendant's right to include indirect costs in its cost of production of gypsum, defendant would not have so expended said sums of money; that defendant has irrevocably altered and changed its position as aforesaid by reason of said expenditures, and defendant would be damaged if it should now be declared that said indirect costs are not properly includable in said cost of production of gypsum or that such inclusion is not in accordance with the provisions of paragraph 6 of said alleged agreement.

#### SIXTH DEFENSE TO FIRST COUNT

As a sixth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the payment by plaintiff to defendant of \$3.76 per ton for gypsum delivered under said alleged agreement from September 4, 1946, to and including November 12, 1946, was made by plaintiff without protest, with full and complete knowledge on the part of plaintiff as to the items of defendant's cost of producing gypsum, on the basis of which said price was determined, and the method employed by defendant in determining said price, and plaintiff thereby waived any right that it otherwise might have had to question the propriety of said price of \$3.76 per ton for the gypsum so delivered by defendant to plaintiff.

## SEVENTH DEFENSE TO FIRST COUNT

As a seventh, separate, and affirmative defense to the first [23] count of plaintiff's complaint herein, defendant alleges as follows:

That plaintiff is in default in the performance of its obligations under the terms of said alleged agreement referred to in plaintiff's complaint and attached as "Exhibit A" thereto in that plaintiff has breached said alleged agreement in material respects as follows:

1. That pursuant to paragraph 1 of said alleged agreement, plaintiff agreed to purchase all gypsum produced at the defendant's plant in excess of 4,000 tons per annum, which excess was to be available for use for agricultural, building, or construction purpose or any other commercial purpose other than for chemical, pharmaceutical, or scientific purposes, which latter purposes were reserved exclusively to the defendant. Plaintiff in violation of said expressed terms of said alleged agreement sold gypsum for chemical, pharmaceutical and scientific purposes, which said gypsum was purchased by plaintiff from defendant.

2. That plaintiff has failed to pay defendant the full purchase price, as in said alleged agreement provided, for gypsum sold and delivered by defendant to plaintiff pursuant thereto.

## EIGHTH DEFENSE TO FIRST COUNT

As an eighth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the alleged cause of action is barred by the terms and provisions of the California Code of Civil Procedure, Section 343, in that said cause of action accrued more than four years preceding commencement of this action.

#### NINTH DEFENSE TO FIRST COUNT

As a ninth, separate, and affirmative defense to the first count of plaintiff's complaint herein, defendant alleges as follows:

That the alleged cause of action is barred by the terms and provisions of the California Code of Civil Procedure, Section 337, Subdivision 1, in that said cause of action accrued more than four years next preceding commencement of this action.

#### TENTH DEFENSE TO FIRST COUNT

As a tenth, separate, and affirmative defense to the first count [24] of plaintiff's complaint herein, defendant alleges as follows:

That plaintiff asserts and contends that defendant's "cost of production," as said expression is used in paragraph 6 of said alleged agreement, does not include indirect costs, such as overhead. Continuously, ever since August, 1941, plaintiff has known that defendant has contended, and still does contend, that such indirect costs are properly includable in defendant's "cost of production" of gypsum. Although so informed, plaintiff has delayed unduly and inexcusably in commencing this action for a declaratory judgment that such indirect costs are not properly includable in defend-

ant's cost of production, wherefore, plaintiff's alleged cause of action is barred by laches.

### ELEVENTH DEFENSE TO FIRST COUNT

As an eleventh, separate, and affirmative defense to the first count of plaintiff's complaint herein defendant alleges as follows:

That said first count fails to state a cause of action upon which declaratory relief can be granted by this Court.

### FIRST DEFENSE TO SECOND COUNT

1. Defendant repeats and realleges herein paragraphs 1 and 2 of its First Defense to the First Count of plaintiff's complaint.

2. Answering the allegations of paragraph 2 of said Second Count, defendant admits that plaintiff has from time to time made deductions from the price of gypsum sold to plaintiff pursuant to said alleged agreement by reason of the alleged failure of various lots of said gypsum to conform within 2% in gypsum content to the chemical analysis and specifications set forth in paragraph 5 of said alleged agreement. Defendant admits that defendant has asserted and now asserts and alleges that the deductions so made by plaintiff in the total amounts of \$2,165.10 were not authorized in whole or in part by paragraph 5 of said alleged agreement, and that defendant has demanded that plaintiff pay said sum of \$2,165.10 to defendant; denies that such assertion by defendant is erroneous and denies that any of the deductions



so made by plaintiff in the sum of \$2,165.10 were proper or permissible; that plaintiff is thereby indebted to defendant in the sum of \$2,165.10 for deductions improperly made by [25] plaintiff as aforesaid, no part of which sum has been paid although duly demanded and the whole amount whereof is now due, owing and unpaid by plaintiff to defendant.

## SECOND DEFENSE TO SECOND COUNT

As a second, separate, and affirmative defense to the second count of plaintiff's complaint herein, defendant alleges as follows:

That said second count fails to state a cause of action upon which declaratory relief can be granted by this Court.

## FIRST DEFENSE TO THIRD COUNT

1. Defendant repeats and realleges herein paragraphs 1 and 2 of its First Defense to the First Count of plaintiff's complaint.

2. Defendant claims and alleges that under the terms of paragraph 3 of said alleged agreement the right of plaintiff to refuse to purchase and accept in excess of 2,000 tons in any one month applies and is operative only in a calendar year in which plaintiff has elected to refuse to purchase and accept in excess of 20,000 tons of gypsum and that in any calendar year in which plaintiff has so failed to elect plaintiff is obligated to purchase and accept all gypsum produced by defendant in approximately equal monthly quantities as in said alleged agreement provided.

SECOND, THIRD, FOURTH, FIFTH AND  
SIXTH DEFENSES TO THE THIRD COUNT

As second, third, fourth, fifth and sixth separate and affirmative defenses respectively to the Third Count of plaintiff's complaint herein, defendant repeats and re-alleges with the same force and effect as though the same were re-incorporated and set forth herein in detail the respective defenses referred to in the answer hereinabove as follows: "Second Defense to First Count," "Third Defense to First Count," "Fourth Defense to First Count," "Seventh Defense to First Count," and "Eleventh Defense to First Count."

FOR A FIRST SEPARATE AND DISTINCT  
COUNTER CLAIM BY DEFENDANT  
AGAINST PLAINTIFF

1. Plaintiff is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California. [26]

2. Defendant is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Delaware, and qualified under the laws of the State of California to do business therein, and has designated an agent in the City and County of San Francisco and within this district upon whom process may be served herein.

3. The value of the matter involved in this suit is in excess of the sum of \$3,000, exclusive of in-



terest and costs, and because of the diversity of citizenship between plaintiff and defendant, plaintiff has elected to commence this action in the District Court of the United States for the Northern District of California, Southern Division.

4. On or about the 29th day of January, 1937, plaintiff and defendant entered into that certain written alleged agreement referred to in plaintiff's complaint herein and attached thereto as "Exhibit A," thereof, and hereby referred to and incorporated herein by reference with the same force and effect as if herein set out in full. In or about the month of March, 1937, defendant, with plaintiff's written consent, succeeded to all of the right, title, and interest under said alleged agreement of said California Chemical Company.

5. Between December 31, 1940, and August 31, 1946, plaintiff from time to time made unauthorized deductions from the price of gypsum sold by defendant to plaintiff during said period by reason of the alleged failure of various lots of said gypsum to conform within 2% in gypsum content to the chemical analysis and specifications set forth in paragraph 5 of said alleged agreement. The aggregate amount of such unauthorized deductions so made by plaintiff was the sum of \$2,165.10. No part of the sum of \$2,165.10 has been paid by plaintiff to defendant, although duly demanded, and the whole amount thereof is now due and owing and unpaid by plaintiff to defendant.

FOR A SECOND SEPARATE AND DISTINCT COUNTERCLAIM BY DEFENDANT AGAINST PLAINTIFF

1. Defendant repeats and re-alleges herein paragraphs 1, 2, 3, and 4 of defendant's first counterclaim above, with the same force and effect as though herein separately stated and set forth. [27]

2. During the times specified in the complaint and pursuant to paragraph 1 of said alleged agreement, referred to in plaintiff's complaint and attached as "Exhibit A" thereto, plaintiff agreed to purchase all gypsum produced at the defendant's plant in excess of four thousand (4,000) tons per annum which excess was to be available to plaintiff for use in agricultural, building, or construction purposes, or any other commercial purpose other than for chemical, pharmaceutical, or scientific purposes, and it was the expressed intent and understanding of the parties to said alleged agreement that the plaintiff was not to purchase gypsum for chemical, pharmaceutical, or scientific purposes, which purposes were reserved exclusively to the defendant. Plaintiff, in violation of said expressed terms of said alleged agreement between the parties hereto, sold gypsum for chemical, pharmaceutical, and scientific purposes, which said gypsum was purchased by plaintiff from defendant.

FOR A THIRD SEPARATE AND DISTINCT COUNTERCLAIM BY DEFENDANT AGAINST PLAINTIFF

1. Defendant repeats and re-alleges herein paragraphs 1, 2, 3, 4, and 5 of defendant's first coun-

terclaim above and paragraph 2 of the defendant's second counterclaim above with the same force and effect as though herein separately stated and set forth.

2. By reason of the aforesaid breaches of said alleged agreement by plaintiff, defendant asserts and contends that defendant is entitled to rescind and terminate said alleged agreement, and defendant does hereby assert its intention and election to so rescind and terminate said alleged agreement.

Wherefore, Defendant Prays as Follows:

1. That this Court adjudge that said alleged agreement, dated January 29, 1937, a copy of which is attached to plaintiff's complaint as "Exhibit A" thereto, is null, void, and of no force and effect.

2. That defendant have judgment against the plaintiff herein dismissing the plaintiff's complaint and each count therein on the merits. [28]

3. That this Court adjudge that plaintiff pay to the defendant on the first counterclaim the sum of \$2,165.10, together with interest thereon.

4. As an alternative to Subdivision 1 hereinabove, that this Court adjudge and declare that the plaintiff has breached the terms and provisions of the said alleged agreement in material respects and the said alleged agreement be de-

clared rescinded and terminated by reason of said breaches.

5. As a second alternative that this Court adjudge and declare the respective rights, obligations, and other legal relations of the plaintiff and defendant created or existing with respect to the said alleged agreement and in particular that:

(a) Defendant's cost of producing gypsum as determined by defendant from time to time and the resultant increases in price established by defendant as alleged in plaintiff's complaint have been in accordance with the terms and provisions of said alleged agreement;

(b) The deductions made by plaintiff from the price of gypsum by reason of its alleged failure to conform to the specifications set forth in said alleged agreement in the aggregate sum of \$2,165.10, were improper; and

(c) The right of plaintiff to refuse to purchase and accept in excess of 2,000 tons of gypsum in any one month as provided in paragraph 3 of said alleged agreement applies and is operative only in a calendar year in which plaintiff has elected to refuse to purchase and accept in excess of 20,000 tons of gypsum.

7. That plaintiff take nothing by its complaint herein, and that defendant have judgment for its cost of suit and disbursements herein.

8. For such other and further relief as the Court deems proper in the premises.

TADINI BACIGALUPI,  
CLAUDE ROSENBERG,  
BACIGALUPI, ELKUS &  
SALINGER,

Attorneys for Defendant. [29]

Receipt of a copy of the within Answer is hereby admitted this .... day of May, 1947.

.....,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1947. [30]

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[Title of District Court and Cause.]

## PLAINTIFF'S REPLY TO COUNTERCLAIMS

Replying to the counterclaims set forth in the answer of defendant, Westvaco Chlorine Products Corporation, plaintiff denies and avers as follows:

### REPLY TO FIRST COUNTERCLAIM

1. Plaintiff denies all the allegations contained in that part of paragraph 4 of the defendant's first counterclaim commencing with the words "On or about," in line 18, page 11, and ending with the word "agreement," in line 20, page 11, of the answer; and avers that on or about the 29th day of January, 1937, plaintiff and California Chemical Company entered into the agreement attached to the complaint on file herein as Exhibit A thereto.

2. Plaintiff denies all the allegations contained in paragraph 5 of defendant's first counterclaim.



## REPLY TO SECOND COUNTERCLAIM

1. In reply to paragraph 1 of defendant's second counterclaim, plaintiff repeats and incorporates herein to the same extent as though set forth in full, plaintiff's denials and averments in reply to paragraph 4 of defendant's first counterclaim.

2. Plaintiff denies all the allegations contained in paragraph 2 of defendant's second counterclaim; and avers that plaintiff's agreement in the premises was and is as set forth in the contract attached to the complaint on file herein as Exhibit A thereto.

## REPLY TO THIRD COUNTERCLAIM

1. In reply to paragraph 1 of defendant's third counterclaim, plaintiff repeats and incorporates herein to the same extent as though set forth in full, plaintiff's denials and averments in reply to paragraphs 4 and 5 of defendant's first counterclaim and in reply to paragraph 2 of defendant's second counterclaim.

2. Plaintiff denies all the allegations contained in paragraph 2 of defendant's third counterclaim.

Wherefore, plaintiff prays that defendant take nothing [31] by reason of its counterclaims and that plaintiff have judgment as prayed in the complaint on file herein.

/s/ PILLSBURG, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

(Acknowledgment of Service attached.)

[Endorsed]: Filed July 15, 1947. [32]

[Title of District Court and Cause.]

ORDER FOR REFUND OUT OF DEPOSIT IN  
COURT AND FOR REDUCTION OF FUR-  
THER DEPOSITS

Pursuant to the stipulation of the parties endorsed hereon, it is hereby Ordered:

1. That plaintiff is entitled to a refund in the amount of \$3,078.94 out of the sums heretofore deposited by plaintiff in Court, pursuant to the order of this Court dated March 14, 1947; and the Clerk of this Court is hereby ordered to disburse said sum of \$3,078.94 to the plaintiff.

2. The deposits to be made by plaintiff with the Court pursuant to paragraph 1 of said order of March 14, 1947, are hereby reduced to 84c per ton instead of 96c per ton, commencing with the payment due on October 15, 1947.

3. Upon making such deposits and upon paying to defendant as provided in the contract attached as Exhibit "A" to the complaint on file herein, the balance of the price per ton claimed by defendant, to wit, \$4.36 per ton, less any deductions under paragraph (5) of said contract, plaintiff shall be deemed to have fully performed its obligations of payment with respect to each month's deliveries of gypsum covered by each deposit and payment so made.

4. This order is made for the purpose of correcting an excess charge of 12c per ton by defendant in the price per ton of gypsum claimed by it effective November 13, 1946, and is made



without prejudice to the rights of either party with respect to any other or further alleged excess charges, or any other issue in the above entitled cause.

5. Except as amended by this order, the aforesaid order of March 14, 1947, shall remain in effect.

Done in open Court, this 19th day of September, 1947.

MICHAEL J. ROCHE,  
United States District Judge.

It is hereby stipulated that the foregoing order may be entered by consent.

Dated this 12th day of September, 1947.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 19, 1947. [78]

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[Title of District Court and Cause.]

AMENDMENT TO PLAINTIFF'S REPLY TO  
COUNTERCLAIMS

The plaintiff above named hereby amends its reply filed herein on July 15, 1947, to the counterclaims contained in the answer of the defendant filed herein on May 14, 1947, by adding to said reply the following:

Affirmative Defense to First, Second and Third Counterclaims,

As a separate and affirmative defense to the first, second and third counterclaims, and each of them, contained in defendant's answer herein plaintiff alleges that:

Each of the alleged causes of action set forth in said counterclaims is barred by the provisions of the California Code of Civil Procedure section 337, subdivision 1, and section 343, in that each of said causes of action accrued more than four years next preceding defendant's filing of said counterclaims and next preceding the commencement of this action.

Plaintiff further alleges that each of the alleged causes of action set forth in said counterclaims is barred by the provisions of the California Code of Civil Procedure section 339, subdivision 1. in that each of said causes of action accrued more than two years next preceding defendant's filing of said counterclaims and next preceding the commencement of this action.

Wherefore, plaintiff prays that defendant take nothing by reason of said counterclaims and that plaintiff have judgment as prayed in the complaint on file herein.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE. [79]

It is hereby stipulated by defendant that the foregoing amendment to plaintiff's reply may be filed without the necessity of plaintiff's making a motion for leave of court to file the same. This stipulation shall not, however, be deemed an admission of the validity of any of the defenses asserted in the said amendment, and shall be without prejudice to any rights of defendant in respect thereto.

/s/ CLAUDE N. ROSENBERG,  
/s/ BACIGALUPI, ELKUS &  
SALINGER.

Said amendment may be filed.

MICHAEL J. ROCHE,  
United States District Judge.

[Endorsed]: Filed Oct. 2, 1947. [80]

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[Title of District Court and Cause.]

STIPULATION FOR COMPROMISE AND DIS-  
MISSAL OF DEFENDANT'S FIRST COUN-  
TERCLAIM

Whereas by its first counterclaim in the above-entitled action, Defendant seeks to recover from Plaintiff the sum of Two Thousand One Hundred Sixty-five Dollars and Ten Cents (\$2,165.10) for alleged unauthorized deductions from the price of gypsum sold by Defendant to Plaintiff, which deductions were made and taken by Plaintiff during the period between December 31, 1940, and October 31, 1946; and

Whereas, Plaintiff admits being indebted to Defendant in the sum of Five Hundred Thirty-nine Dollars and Twenty-four Cents (\$539.24) for erroneous deductions taken by Plaintiff during said period, which Plaintiff claims resulted through inadvertence, but contends that all other deductions taken by Plaintiff during said period were justified by and in accordance with the provisions of paragraph 5 of that certain contract between Plaintiff and Defendant dated January 29, 1937, which contract is the subject of the above suit; and

Whereas, during the course of the trial of the above-entitled action, Plaintiff and Defendant agreed that they would compromise the aforementioned claim and relieve the Court of the necessity of determining and rendering judgment upon Defendant's first counterclaim.

Now, Therefore, it is hereby stipulated and agreed by and between the Plaintiff and Defendant above named, through their respective counsel, as follows:

1. Concurrently herewith Plaintiff has paid unto Defendant the sum of One Thousand Three Hundred Twenty-nine Dollars and Eighty-three Cents (\$1,329.83), and said sum has been received and accepted by Defendant, in full [89] settlement and satisfaction of the claim of \$2,165.10 asserted by Defendant in Defendant's said first counterclaim.

2. In consideration of the payment of said sum by Plaintiff to Defendant, Plaintiff and Defendant do jointly stipulate that said first counterclaim may be and it is hereby dismissed.

3. The compromise of said first counterclaim as herein provided for shall be without prejudice

to any claims, demands or contentions of either party hereto in the above action, other than the specific money claim in the sum of \$2,165.10 asserted by Defendant in said first counterclaim, and shall likewise be without prejudice to any claim which Defendant now has or hereafter may have against Plaintiff on account of any deductions taken by Plaintiff subsequent to October 31, 1946. It is hereby expressly stipulated and agreed between the parties that nothing herein contained is intended or to be construed as a determination of the controversy existing between the parties with respect to the intent and interpretation of paragraph 5 of said agreement.

Dated this 10th day of February, 1948.

PILLSBURY, MADISON &  
SUTRO,

Attorneys for Plaintiff.

BACIGALUPI, ELKUS &  
SALINGER,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 17, 1948. [90]

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[Title of District Court and Cause.]

### ORDER FOR ENTRY OF JUDGMENT

The above-entitled cause having been heretofore submitted and being now fully considered, it is by the Court

Ordered that there be entered herein, upon find-

ings of fact and conclusions of law, judgment declaring the rights and liabilities of the parties hereto as follows:

1. Said contract dated January 29, 1937, is a valid contract.

2. The term "cost of production" as used in Paragraph (6) of said contract is not limited to "actual" or "direct" costs.

3. Defendant's cost of producing gypsum as determined [91] by defendant from time to time and the resultant increases in price established by defendant as alleged in plaintiff's complaint have been in accordance with the terms and provisions of said agreement.

4. Plaintiff's rights of refusal under Paragraph (3) of said contract are separate and distinct.

5. The right of deduction for failure of the gypsum to conform to the required specifications, permitted by Paragraph (5) of said contract, does not permit fractional deductions for fractional percentages.

6. The respective parties will pay their own costs.

Dated: March 30th, 1948.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Mar. 30, 1948. [92]



[Title of District Court and Cause.]

STIPULATION AND ORDER RE PAYMENTS  
UNDER CONTRACT AND RE STAY OF  
JUDGMENT

Whereas by its judgment herein the above-entitled court has determined, among other things, that the price of [140] gypsum under the contract between the parties hereto dated January 29, 1937, is \$3.76 per ton for the period from September 4, 1946, to and including November 12, 1946, and is \$4.36 per ton for the period from and after November 13, 1946; and plaintiff is required by said judgment hereafter to pay defendant \$4.36 per ton for gypsum sold and delivered under said contract; and

Whereas plaintiff has paid for gypsum sold and delivered under said contract during the period from and including February 1, 1947, to and including March 31, 1948, in the manner provided in this court's order of March 14, 1947, as amended September 19, 1947, depositing a portion of each monthly payment in court in accordance with said order; and defendant has moved for the termination of said order and the disbursement to it of the sum heretofore paid into court thereunder; and

Whereas plaintiff desires to take an appeal herein and to have a stay pending its appeal, and this stipulation is intended to operate as a stay and supersedeas upon said appeal in lieu of continued deposits in court and retention by the court of the

sums on deposit and in lieu of plaintiff's giving a supersedeas bond;

Now, Therefore, it is hereby stipulated between the parties hereto that:

1. The sums heretofore paid into court by plaintiff under the order of the above-entitled court dated March 14, 1947, as amended September 19, 1947, which sums now total \$37,603.61 and relate to gypsum sold and delivered by defendant to plaintiff under the contract of January 29, 1937, for the period from and including February 1, 1947, to and including March 31, 1948, shall be immediately paid over to defendant by the clerk. [141]

2. As to all payments for gypsum sold and delivered by defendant to plaintiff under said contract subsequent to March 31, 1948, said order is terminated, and plaintiff shall pay directly to defendant the full price claimed by defendant to be payable for such gypsum, to wit, 4.36 per ton less deductions under paragraph (5) of said contract.

3. Plaintiff shall pay to defendant the sum of \$68.12 deducted by it, due to the inclusion of fractions of a per cent of deficiency in gypsum content in calculating deductions under paragraph (5) of said contract, from the price of gypsum sold and delivered under said contract for the period from November 1, 1946, to and including March 31, 1948. As to all gypsum sold and delivered under said contract subsequent to March 31, 1948, plaintiff shall pay therefor without any such deductions on account of fractions, but plaintiff shall accompany its monthly payment for gypsum with a statement of the amount

of any deduction claimed on account of such fractions.

4. The payment to defendant of the sums now on deposit pursuant to paragraph 1 hereof, and payments by plaintiff to defendant under paragraphs 2 and 3 thereof shall be without prejudice to any of plaintiff's rights under said contract or to any of its rights in the above-entitled cause, including its rights on appeal, and it shall not be deemed that any such right has been waived by plaintiff by reason of such payments.

5. If it is ultimately determined by final judgment herein (not subject to further review or the time for further review having expired) that any lower prices were or are payable by plaintiff to defendant than \$3.76 per ton for gypsum sold and delivered from September 4, 1946, to and including November 12, 1946, or \$4.36 per ton for gypsum sold and delivered from and [142] after November 13, 1946, then defendant shall refund to plaintiff the amounts plaintiff shall have paid to defendant in excess of the price or prices so determined to be payable. If it is so determined that plaintiff is entitled to include fractions of a per cent of deficiency in gypsum content in calculating deductions under paragraph (5) of said contract, the said \$68.12 paid by plaintiff shall also be refunded by defendant to plaintiff, together with any further refund to which plaintiff may be entitled on account of fractional percentage deductions not taken by plaintiff on shipments of gypsum subsequent to March

31, 1948. In this regard, plaintiff recognizes that defendant contends that none of the gypsum so shipped between November 1, 1946, to and including March 31, 1948, was below 95.51 per cent in gypsum content, and the parties mutually recognize that a dispute may arise between them with reference to the proper chemical analysis of gypsum sold and delivered under said contract subsequent to March 31, 1948. Accordingly, it is mutually stipulated and agreed that nothing herein contained shall operate as a waiver of such contention by defendant, nor to the prejudice of the position of either party in connection with any such dispute as may arise.

6. If at any time before such final determination of this cause defendant claims any further increase in the price of gypsum under said contract, the amount thereof may be paid to defendant until such determination, without prejudice to or waiver of plaintiff's right to contend that said increased payments or any part thereof are contrary to the contract and to sue to recover the same or otherwise have their validity determined.

7. Plaintiff shall not be required to give any bond for costs on appeal.

8. Nothing in this stipulation contained, nor anything [143] done pursuant thereto, shall operate to the prejudice of the rights of either party under said contract or in the above-entitled cause, including rights on appeal, and it shall not be deemed that any such right has been waived by

either party because of anything contained in this stipulation, or done pursuant thereto.

Dated: April 23d, 1948.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

/s/ TADINI BACIGALUPI,

/s/ CLAUDE N. ROSENBERG,

/s/ BACIGALUPI, ELKUS &

SALINGER,

Attorneys for Defendant.

It is so Ordered this 26th day of April, 1948.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Apr. 26, 1948. [144]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court sitting without a jury, and evidence both oral and documentary having been introduced, and the parties having stipulated to certain matters, and the cause having been submitted for decision, the Court finds the facts and states the conclusions of law, as follows:



## FINDINGS OF FACT

1. That the allegations of paragraphs 1, 2, 3 and 4 of Plaintiff's complaint herein are true. [145]

2. That defendant commenced the production of gypsum at Newark, California, in November, 1937, and ever since, (except for occasional and brief temporary periods), has been and still is there producing gypsum and various other products. That the plant in which said gypsum is produced was constructed between January 29, 1937, and November, 1937.

The Court makes no finding as to whether or not gypsum, as produced by defendant at its Newark, California, plant, is a by-product for the purposes of this action, for the reason that the Court finds as a fact that in determining the cost of production of a by-product which requires an independent physical plant, and independent labor to be performed upon it, in order to convert it into a marketable product, as does the gypsum produced by defendant at its Newark, California, plant, good accounting practice requires the inclusion of "overhead expense" and "indirect charges," as said terms are hereinafter used.

3. That the price and quantity of gypsum sold and to be sold pursuant to said contract are set forth in said contract with sufficient definiteness and certainty to be valid and enforceable. It is untrue that the provisions of said contract, or any of them, relating to the price and/or quantity of gypsum sold thereunder, are vague and/or uncertain and/or indefinite.



4. That it is untrue that said contract is lacking in consideration and/or mutuality and/or is not a valid contract.

5. That it is untrue that any of the gypsum purchased by plaintiff from defendant pursuant to said contract was resold by plaintiff for chemical, or pharmaceutical, or scientific purposes.

6. That it is untrue that plaintiff has been guilty of any breach of said contract which entitles defendant to rescind and/or terminate said contract, or that plaintiff has been [146] guilty of any conduct by which plaintiff became estopped to raise or by which plaintiff waived any objection to defendant's interpretation of paragraph (6) of said contract and/or to any determination by defendant of its cost of production of gypsum thereunder; that it is untrue that plaintiff has been guilty of any conduct amounting to or resulting in laches.

7. That a controversy has existed and does now exist between plaintiff and defendant as to the provisions of the aforementioned contract and the rights and obligations of the parties thereunder as follows:

(a) As to the meaning of paragraph (6) of said contract, including the meaning of the terms "cost of production," "cost of manufacture," and "in an amount not to exceed the actual advance in California's (defendant's) cost of manufacture" as said terms are used therein.

(b) As to whether or not defendant's cost of production of gypsum, as determined by defendant from time to time as hereinafter set forth, was cor-

rect and made in accordance with the provisions of said contract.

(c) As to the meaning of paragraph (5) of said contract, and specifically whether or not, in the event that the gypsum content falls below 95.51%, plaintiff is entitled to deduct from the contract price of said gypsum at the rate of 10c or a fractional part thereof for each per cent or fractional per cent that the gypsum content falls below 97.51%, or whether, in such event, plaintiff is entitled only to an allowance of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gypsum content falls below 97.51%.

(d) As to the proper method to be employed to determine the conformity or non-conformity of gypsum to the chemical analysis and specifications referred to in paragraph (5) of said contract. [147]

(e) As to whether or not plaintiff's right to refuse to purchase and accept in excess of 2,000 tons of gypsum in any one month as provided in paragraph (3) of said contract is separate and distinct from plaintiff's right to refuse to purchase in excess of 20,000 tons of said gypsum in any one calendar year as in said paragraph (3) provided.

8. That it is untrue that defendant has erroneously construed the term "cost of production" as used in paragraph (6) of said contract and/or continues to do so, and/or that defendant has erroneously and/or through the use of improper accounting and/or other methods determined its cost of production of gypsum. In this regard, the Court finds that defendant's cost of producing gypsum as

determined by defendant from time to time and the resultant increases in price established by defendant as hereinafter mentioned, have been in accordance with the terms and provisions of said contract.

9. That the terms "cost of production" and "cost of manufacture" as used in paragraph (6) of said contract are, and were intended by the contracting parties at the time of the execution thereof to be, synonymous; that such terms are not and were not intended by the contracting parties, or either of them, at the time of execution of said contract, to be limited or restricted to "actual" or "direct" costs. Said terms "cost of production" and "cost of manufacture" include, and were intended by the contracting parties at the time of execution of said contract to include, overhead expense and indirect charges which cannot be directly charged to or against each of the various products produced by defendant at its Newark, California, plant; and which must, therefore, be allocated to or apportioned among such products on some reasonable basis; that in determining its cost of production of gypsum from time to time defendant has fairly and reasonably allocated overhead expense and indirect [148] charges thereto.

10. That in August, 1941, defendant notified plaintiff that effective October 5, 1941, the price of gypsum to be sold and delivered by defendant to plaintiff pursuant to said contract would be increased under paragraph (6) of said contract to \$2.98 per ton by reason of the fact that defendant's cost of production of gypsum during the 12-month

period from July 1, 1940, to June 30, 1941, had increased 18c per ton over defendant's cost of production of gypsum during the 12-month period from July 1, 1939, to June 30, 1940; that plaintiff paid defendant at the rate of \$2.98 per ton for all gypsum delivered to plaintiff by defendant pursuant to said contract for the period from October 5, 1941, to September 4, 1946; that defendant's cost of production of gypsum, as determined by defendant, was \$1.66 per ton during the 12-month period from July 1, 1939, to June 30, 1940, and was \$1.84 per ton during the 12-month period from July 1, 1940, to June 30, 1941, and that the said respective costs of production, and the resultant price of \$2.98 per ton hereinbefore mentioned, were determined and established by defendant in accordance with the terms and provisions of said contract.

11. That on or about January 14, 1944, defendant notified plaintiff that effective March 15, 1944, the price of gypsum to be sold and delivered by defendant to plaintiff pursuant to said contract would be increased under paragraph (6) of said contract to \$3.76 per ton by reason of the fact that defendant's cost of production of gypsum during the 12-month period from January 1, 1943, to December 31, 1943, had increased 78c per ton over defendant's cost of production of gypsum during the 12-month period from January 1, 1942, to December 31, 1942.

That defendant's cost of production of gypsum, as determined by defendant, was \$1.93 per ton during the 12-month [149] period from January 1,

1942, to December 31, 1942, and was \$2.71 per ton during the 12-month period from January 1, 1943, to December 31, 1943, and that said respective costs of production, and the resultant price of \$3.76 per ton hereinbefore mentioned, were determined and established by defendant in accordance with the terms and provisions of said contract; that by reason of restrictions imposed by regulation of the Office of Price Administration, defendant was prohibited from charging or receiving the price of \$3.76 per ton, or any price in excess of \$2.98 per ton, from March 15, 1944, to September 4, 1946; that plaintiff protested said price of \$3.76 per ton claimed by defendant, on the ground that said increase of 78c per ton exceeded the actual increase in defendant's cost of production, and under such protest paid defendant at the rate of \$3.76 per ton for 5,091.01 tons of gypsum delivered by defendant to plaintiff pursuant to said contract subsequent to September 4, 1946, and up to and including November 12, 1946; that it is untrue that said payments or any of them so made were in excess of the price properly chargeable by defendant under said contract, by not less than 49c or any other amount per ton, or at all, and/or in a total sum of not less than \$2,494.59, or any other sum, or at all; that plaintiff has at all times been willing to pay 29c of the said increase of 78c per ton claimed by defendant.

12. That on or about September 13, 1946, defendant notified plaintiff that, effective November 13, 1946, the price of gypsum to be sold and deliv-



ered by defendant to plaintiff pursuant to said contract would be increased under paragraph (6) of said contract to \$4.48 per ton by reason of the fact that defendant's cost of production of gypsum during the 12-month period from July 1, 1945, to June 30, 1946, had increased 72c per ton over defendant's cost of production of gypsum during the [150] preceding 12-month period from July 1, 1944, to June 30, 1945; that plaintiff protested said increase to \$4.48 per ton claimed by defendant, on the ground that said increase of 72c per ton exceeded the actual increase in defendant's cost of production, and under such protest plaintiff paid to defendant at the rate of \$4.48 per ton for 7,199.31 tons of gypsum delivered by defendant to plaintiff pursuant to said contract for the period from and including November 13, 1946, to and including January 31, 1947; that subsequent to the commencement of this action, defendant notified plaintiff that defendant had been in error in stating and determining that its cost of production of gypsum during the 12-month period from July 1, 1945, to June 30, 1946, had increased 72c per ton, and that in fact defendant's cost of production of gypsum during said period had increased only 60c per ton, and there was thereupon refunded and paid back to plaintiff 12c per ton for all gypsum theretofore paid for by plaintiff at the rate of of \$4.48 per ton, and defendant thereupon reduced the price of \$4.48 per ton, hereinabove referred to, to \$4.36 per ton, effective as of November 13, 1946; that defendant's



cost of production of gypsum as determined by defendant was \$2.52 per ton during the 12-month period from July 1, 1944, to June 30, 1945, and was \$3.12 per ton during the 12-month period from July 1, 1945, to June 30, 1946, and that the said respective costs of production, and the resultant price of \$4.36 per ton hereinabove mentioned, were determined and established by defendant in accordance with the terms and provisions of said contract; that it is not true that the payments, or any of them, so made by plaintiff to defendant at the rate of \$4.36 per ton were in excess of the price properly chargeable by defendant under said contract by not less than 96c or any other amount per ton, or at all, and/or in the total sum of not less than \$6,911.34, or any other sum, or at all; that plaintiff has at all times been willing to pay 25c of said increase of 60c [151] per ton claimed by defendant.

For the period from February 1, 1947, to the date hereof, plaintiff has paid defendant at the rate of \$3.52 per ton for all gypsum delivered under said contract and has deposited and paid the further sum of \$.84 per ton into court, pursuant to the order of the above-entitled court for such deposit, dated March 14, 1947, as amended September 19, 1947.

13. That it is untrue that in violation of said contract or otherwise or at all, defendant has refused plaintiff access to defendant's books of account and/or records showing defendant's cost of producing gypsum, except that defendant has denied plaintiff access to certain portions of and en-

tries in defendant's books of account and records which contain detailed information of a confidential and secretive nature, and as to those portions and entries defendant offered to plaintiff to permit a reputable, disinterested, independent Certified Public Accountant to inspect said entries and records to ascertain the ultimate facts therein set forth, divorced from the details of a confidential and secretive nature relating to the production of products other than gypsum, and to permit such Accountant to convey to plaintiff any and all ultimate information therein contained pertaining to defendant's cost of producing gypsum; that plaintiff has failed to avail itself or to take advantage of such proposal.

14. That from time to time plaintiff has made deductions from the price of gypsum sold to plaintiff under said contract on the ground that such deductions were justified under the provisions of paragraph (5) of said contract, and defendant has asserted that of the deductions so taken by plaintiff \$2,165.10 were erroneous, unauthorized and contrary to the provisions of said paragraph (5); that by stipulation of the parties [152] filed herein on February 17, 1948, these conflicting claims and contentions were compromised and defendant did dismiss its First Counterclaim in the above-entitled cause. For that reason the Court makes no finding as to the propriety or impropriety of the deductions so taken by plaintiff.

15. That the allegations of paragraph 2 of plaintiff's third cause of action are true; that plain-

tiff's rights of refusal under paragraph (3) of said contract are separate and distinct, so that if plaintiff does not elect to refuse to purchase and accept in excess of 20,000 tons in any one calendar year, plaintiff may nevertheless refuse to purchase and accept in excess of 2,000 tons in any one month during such year; that in the latter event subject to defendant's right to sell the amount so refused for any purpose whatsoever, as in the third paragraph of said paragraph (3) provided, plaintiff remains obligated to purchase and accept from defendant the total amount of gypsum produced by defendant during such year, exclusive of quantities retained by defendant for chemical, pharmaceutical or scientific purposes as in paragraph (1) of said agreement provided, it being incumbent upon plaintiff, in such event, to designate during such year the month or months during such year when plaintiff will purchase and accept the gypsum so refused, if not sold by defendant.

16. That the gypsum which is the subject of said contract is fungible in nature; that at all times since said contract has been in effect the gypsum purchased by plaintiff has been delivered by defendant in bulk and has been stored in bulk by plaintiff from time to time in varying quantities up to 500 tons; that said contract provides for the sale of said gypsum from defendant to plaintiff f.o.b. Newark, California; that for the purpose of determining the conformity or non-conformity of gypsum so delivered to the specifications provided in paragraph [153] (5) of said contract, such gypsum should, in accordance with the

provisions of said contract, be analyzed from samples taken at the point of delivery and as of the condition of such gypsum at such point; that for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by defendant from its Newark, California, plant, to plaintiff in the course of a 24-hour day shall constitute a "shipment" of such term is used hereinabove in this paragraph.

17. That the language of paragraph (5) of said contract means, and was intended by the contracting parties at the time of execution to mean, that in the event that the gypsum content falls below 95.51% plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gypsum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for practional percentages.

18. That each of the counts alleged in plaintiff's complaint states a cause of action upon which declaratory relief may be granted.

19. That the cause of action alleged in the First Count of plaintiff's complaint herein is not barred by the provisions of Section 343 or Section 337, subdivision (1) of the Code of Civil Procedure of the State of California.



20. That upon motion of plaintiff duly made pursuant to Rule 67 of the Federal Rules of Procedure the Court, by order dated March 14, 1947, ordered that until further order of the Court plaintiff deposit with the Court the sum of 96c per ton [154] for all gypsum sold and delivered after January 31, 1947, by defendant to plaintiff under the said contract, such amount of 96c per ton being the difference between the \$4.48 per ton price of gypsum then claimed by defendant under said contract and the price of \$3.52 per ton which plaintiff was and is willing to pay to defendant under the terms and provisions of said contract for the period commencing November 13, 1946; that by order of the above-entitled Court dated September 19, 1947, there was refunded to plaintiff out of the sums theretofore deposited by plaintiff in court, pursuant to said order of March 14, 1947, an amount equal to 12c per ton on all gypsum delivered by defendant to plaintiff pursuant to said contract from February 1, 1947, to September 1, 1947, and paid for by plaintiff, through deposits in Court as aforesaid and payments directly to defendant, at the rate of \$4.48 per ton, and said order of September 19, 1947, further provided that the amount to be deposited in Court by plaintiff for all gypsum sold and delivered by defendant to plaintiff pursuant to said contract from and after September 1, 1947, was reduced from 96c per ton, as provided in said order of March 14, 1947, to 84c per ton.

## CONCLUSIONS OF LAW

1. That the said contract dated January 29, 1937, between plaintiff and defendant is a valid and subsisting contract.

2. That the terms "cost of production" and "cost of manufacture" as used in paragraph (6) of said contract are synonymous and are not limited to "actual" or "direct" costs; that said terms "cost of production" and "cost of manufacture" include overhead expense and indirect charges which cannot be [155] directly charged to or against each of the various products produced by defendant at its Newark, California, plant, and which must, therefore, be allocated to or apportioned among such products on some reasonable basis.

3. That defendant's cost of production of gypsum as determined by defendant from time to time and the resultant increases in price established by defendant from time to time have been in accordance with the terms and provisions of said contract.

4. That plaintiff's rights of refusal under paragraph (3) of said contract are separate and distinct, so that if plaintiff does not elect to refuse to purchase and accept in excess of 20,000 tons in any one calendar year, plaintiff may nevertheless refuse to purchase and accept in excess of 2,000 tons in any one month during such year; that in the latter event, subject to defendant's right to sell the amount so refused for any purpose whatsoever, as in the third paragraph of said paragraph (3) provided. plaintiff remains obligated to purchase and accept from



defendant the total amount of gypsum produced by defendant during such year, exclusive of quantities retained by defendant for chemical, pharmaceutical or scientific purposes as in paragraph (1) of said agreement provided, it being incumbent upon plaintiff, in such event, to designate during such year the month or months during such year when plaintiff will purchase and accept the gypsum so refused, if not sold by defendant.

5. That for the purpose of determining the conformity or non-conformity to the requirements of paragraph (5) of said contract of gypsum sold and delivered by defendant to plaintiff pursuant to said contract such gypsum should, in accordance with the provisions of said contract, be analyzed from samples taken at the plant of defendant at Newark, California, and as of the condition of such gypsum at that point, [156] and for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by defendant from its Newark, California, plant to plaintiff in the course of a 24-hour day shall constitute a "shipment" as such term is used hereinabove in this paragraph.

6. That the provisions of paragraph (5) of said contract mean that in the event that the gypsum content of gypsum sold and delivered by defendant

to plaintiff, pursuant to said contract, and determined as in the preceding paragraph hereof provided, falls below 95.51%, plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents that the gypsum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for fractional percentages.

7. That defendant's First Counterclaim, Second Counterclaim and Third Counterclaim be dismissed.

8. That plaintiff is not entitled to judgment against defendant for the sum of \$9,405.93, or any other sum.

9. That the respective parties shall pay their own costs.

It Is So Ordered and judgment shall be entered accordingly.

Dated this 26th day of April, 1948.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Apr. 26, 1948. [157]

In the Southern Division of the United States District Court for the Northern District of California

No. 26,934-R

PACIFIC PORTLAND CEMENT COMPANY, a  
California Corporation,

Plaintiff,

vs.

WESTVACO CHLORINE PRODUCTS CORPORATION, a Corporation,

Defendant.

### JUDGMENT

The above-entitled cause came on regularly for trial before the Court sitting without a jury, and evidence both oral and documentary having been introduced, and the parties having stipulated to certain matters, and the case having been briefed and orally argued, and the cause submitted to the Court for decision, and the Court having heretofore made and caused to be filed herein its Findings of Fact and Conclusions of Law, and being fully advised, [158]

It Is Ordered, Adjudged and Decreed as Follows:

1. That that certain contract dated January 29, 1937, between plaintiff and defendant, a copy of which is attached to plaintiff's complaint herein as Exhibit "A" thereof, is a valid and subsisting contract.

2. That the term "cost of production" and "cost of manufacture" as used in paragraph (6) of said contract are synonymous and are not limited to

“actual” or “direct” costs; that said terms “cost of production” and “cost of manufacture” include overhead expense and indirect charges which cannot be directly charged to or against each of the various products produced by defendant at its Newark, California, plant, and which must, therefore, be allocated to or apportioned among such products on some reasonable basis.

3. That defendant’s cost of production of gypsum as determined by defendant from time to time and the resultant increases in price established by defendant from time to time have been in accordance with the terms and provisions of said contract, and such costs so determined by defendant and the resultant prices to which defendant became entitled were as follows:

Period	Cost of Production
From July 1, 1939, to June 30, 1940.....	\$1.66 per ton
From July 1, 1940, to June 30, 1941.....	1.34 per ton
From Jan. 1, 1942, to Dec. 31, 1942.....	1.93 per ton
From Jan. 1, 1943, to Dec. 31, 1943.....	2.71 per ton
From July 1, 1944, to June 30, 1945.....	2.52 per ton
From July 1, 1945, to June 30, 1946.....	3.12 per ton
Period	Price
From Oct. 5, 1941, to Sept. 4, 1946.....	\$2.98 per ton
From Sept. 4, 1946, to Nov. 13, 1946.....	3.76 per ton
From Nov. 13, 1946.....	4.36 per ton

4. That plaintiff’s rights of refusal under paragraph (3) of said contract are separate and distinct, so that if plaintiff does not elect to refuse to purchase and accept in [159] excess of 20,000 tons in any one calendar year, plaintiff may nevertheless refuse to purchase and accept in excess of

2,000 tons in any one month during such year; that in the latter event, subject to defendant's right to sell the amount so refused for any purpose whatsoever, as in the third paragraph of said paragraph (3) provided, plaintiff remains obligated to purchase and accept from defendant the total amount of gypsum produced by defendant during such year, exclusive of quantities retained by defendant for chemical, pharmaceutical or scientific purposes as in paragraph (1) of said agreement provided, it being incumbent upon plaintiff, in such event, to designate during such year the month or months during such year when plaintiff will purchase and accept the gypsum so refused, if not sold by defendant.

5. That for the purpose of determining the conformity or non-conformity to the requirements of paragraph (5) of said contract of gypsum sold and delivered by defendant to plaintiff pursuant to said contract such gypsum should, in accordance with the provisions of said contract, be analyzed from samples taken at the plant of defendant at Newark, California, and as of the condition of such gypsum at that point, and for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by



defendant from its Newark, California, plant, to plaintiff in the course of a 24-hour day shall constitute a "shipment" as such term is used hereinabove in this paragraph.

6. That the provisions of paragraph (5) of said contract mean that in the event that the gypsum content of gypsum [160] sold and delivered by defendant to plaintiff, pursuant to said contract, and determined as in the preceding paragraph hereof provided, falls below 95.51%, plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gypsum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for fractional percentages.

7. That defendant's First Counterclaim, Second Counterclaim and Third Counterclaim be dismissed.

8. That plaintiff is not entitled to judgment against defendant for the sum of \$9,405.93, or any other sum.

9. That the respective parties shall pay their own costs.

Done in open court this 26th day of April, 1948.

/s/ MICHAEL J. ROCHE,  
United States District Judge.

[Endorsed]: Filed Apr. 26, 1948. [161]



[Title of District Court and Cause.]

Action for declaration of rights under a certain contract. Judgment as heretofore entered.

Pillsbury, Madison & Sutro, Eugene D. Bennett, Maurice D. L. Fuller, and Wallace L. Kaapcke, all of San Francisco, California, attorneys for plaintiff. Tadini Bacigalupi, Claude N. Rosenberg, Bacigalupi, Elkus & Salinger, all of San Francisco, California, attorneys for defendant.

### MEMORANDUM OF OPINION

Roche, D. J.: In this action for declaratory relief the court is asked to construe a certain contract for the sale of [162] gypsum, with particular reference to Paragraphs (3), (5) and (6) thereof. Since paragraph (6)\*, which contains the so-called "escalator price provision," presents the major disagreement,

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\*(6) In the event that California's cost of production of gypsum for any twelve (12) months' period during the term hereof shall increase five per cent (5%) above its average cost of production of gypsum for the preceding twelve (12) months' period, then and in that event California shall have the right, upon giving sixty (60) days' written notice to Pacific, to increase the price payable hereunder for gypsum thereafter delivered hereunder in an amount not to exceed the actual advance in California's cost of manufacture; provided that in no event may more than one such increase be made in any one calendar year.

California shall keep books of account and records showing its production cost of gypsum, and such books of account and records relating to the production cost of gypsum shall be open to inspection to Pacific at all reasonable times in order to enable Pacific to confirm the correctness of any advance in price permissible under this paragraph.

the court will devote the greater part of this discussion to that section of the contract.

The basic controversy between the parties is in the construction of the term "cost of production" as used in Paragraph (6). Plaintiff contends that it includes only the direct costs attributable to the production of gypsum and that price increases based on indirect as well as direct costs are not authorized by the contract. In this connection the complaint alleges, on information and belief, that certain payments, made under protest, were in excess of the price properly chargeable by the defendant under the contract.

Defendant makes two contentions: First, that the term "cost of production" is so indefinite as to render the contract void and second, in the event the court holds the contract valid, that the term should be construed to include not only direct costs but an allocation of indirect costs and general plant overhead.

The first question for decision is the validity of the contract and to determine this the court will look not only to the face of the contract but also to all attending circumstances, as disclosed by the evidence. [163]

The original contracting parties were plaintiff and California Chemical Company, defendant's assignor. The record discloses that in 1936 California Chemical was contemplating building a sea water magnesia plant at Newark, California, located on San Francisco Bay, and expected to extract gypsum and bromine as well as magesia. Because of the proximity of plaintiff's cement plant, California's then president, Stanley H. Barrows,

approached James H. Colton, plaintiff's vice-president, and suggested that plaintiff might be interested in buying this contemplated output of gypsum. Colton was receptive and on June 5, 1936, Barrows wrote to Colton, outlining briefly a proposed basis for such an agreement. As thus outlined the agreement would have covered other products besides gypsum and would have contained certain price protection clauses to guard against increases in labor, fuel and supplies, as well as a cancellation privilege on the part of California. Further informal negotiations followed the receipt of this letter and on September 18, 1936, Barrows sent Colton a draft of the proposed contract. This, too, covered several products and the price protection clause was again based on increase in direct costs and a right of cancellation was given to California. Colton refused the cancellation clause and insisted plaintiff alone be given such right. Barrows testified that this stand of plaintiff made it necessary for him to protect his company on the price and that he was no longer willing to limit cost to the items that had previously been enumerated. Further negotiation followed. Rather than attempting to enumerate all the items that might go to make up cost, the parties finally agreed on the term "cost of production" and that the cost records should be kept in accordance with proper and accepted accounting practice.

The formal contract, covering gypsum only, was signed on January 29, 1937, and was to run until January 31, 1962, subject, however, to cancellation

by plaintiff at any time during the first two years, upon giving of written notice, and any time after the first two years upon giving of one year's written notice. [164] Defendant Westvaco acquired California's rights almost immediately.

The record does not show what, if any, cost figures were utilized in fixing the basic contract price of \$2.80 per ton. Only a pilot plant was in operation at that time, defendant's commercial plant having been constructed later. Sale of the gypsum continued at the contract price until August 4, 1941, when defendant notified plaintiff that there had been an 18-cent-per-ton increase in cost of manufacture and that, in accordance with the provisions of Paragraph (6), the price would be increased to \$2.98 a ton. The record shows that early in October Colton and plaintiff's then accountant, one Canvin, visited defendant's plant for a conference to determine whether the \$2.98 price was justified. While Colton was being shown over the plant, Canvin and defendant's accountant went over the figures. The following day defendant's chief accountant wrote plaintiff as follows:

“In accordance with request of yourself and J. H. Colton, while in conference with Mr. Wallace yesterday, we have analyzed gypsum production costs for the years ending June, 1940, and June, 1941. We are attaching hereto a recapitulation of labor, material and power costs which accounts for 15c per ton of the 18c per ton increase of which you have been pre-

viously notified, and which increase is effective October 5, 1941.

“If you desire further information in re the attached statement, or in connection with our basis of determining increase in cost, please call on the writer.” (Emphasis the court’s).

Plaintiff paid the new price without protest and requested no further information.

There was no further price raise until January, 1944, when defendant notified plaintiff that there had been an actual increase in cost of manufacture of 78 cents and that the price per ton was accordingly being raised to \$3.76. Plaintiff replied with a request for a description of the accounting basis for each classification of cost and asked whether it had been consistently followed since the inception of the contract. Defendant stated that it had, and provided information showing an allocation of general plant overhead and indirect costs in addition to the direct costs of producing the gypsum. Plaintiff objected to such allocation and the resultant controversy culminated in this litigation. [165] The situation was not changed by a third price increase to \$4.62 per ton in November, 1946.

This is a long-term contract in which each party sought to protect itself. Plaintiff secured the sole cancellation right. Without a price protection clause defendant might well find the contract ruinous. Bearing in mind the background of negotiations and Barrow’s testimony, uncontradicted by



Colton, that he was unwilling to relinquish his cancellation right and at the same time limit his costs to those items directly chargeable to the gypsum production, it seems clear to the court that when the parties used the term "cost of production" they intended it to include all costs that might be shown by accepted accounting practice. The parties' conduct with reference to the first price raise supports this conclusion. It is difficult for the court to believe that plaintiff's accountant in checking over defendant's figures for the express purpose of determining whether a price increase was justified would ignore the fact that one-sixth of such increase resulted from an increase in indirect costs.

The term "cost of production" is indefinite only in the sense that its determination must be had by reference to defendant's accounting records. These, the contract provides and the evidence shows, are open to plaintiff. Applying the principle that "that is certain which may be made certain," the court holds that the contract is not invalid for uncertainty.

Much of the foregoing discussion is applicable to plaintiff's contention that "cost of production" refers only to "actual" or "direct" costs. This contention is based largely on the contract designation of gypsum as a "by-product," plaintiff taking the position that proper accounting practice charges to a by-product only those cost items incurred after its separation from the material of the main product. This position is not supported by the evidence, which shows that accepted accounting prac-



tice may charge to a by-product a proportionate share of indirect and overhead as well as the direct costs. Defendant has a uniform accounting system for all its plants. The record discloses that the cost [166] records, upon which price increases could be based, were to be kept in accordance with proper and accepted accounting practice. Since the plaintiff has failed to prove that defendant's records were not so kept and that the price raises, consequently, were unjustified, the court concludes that defendant's method of determining its cost of producing gypsum is in accordance with the terms of the contract.

The remaining two provisions the court is asked to construe are clear from the plain language of the contract. Paragraph (3) gives plaintiff the right to refuse to purchase and accept in excess of 2000 tons of gypsum in any one month, or 20,000 tons in any one year. Defendant maintains that if plaintiff fails to refuse in excess of 20,000 tons, it loses the right to refuse in excess of 2000 tons in any one month. Plaintiff treats these as separate and distinct rights. In the contract each is set forth in a separate paragraph; when both are referred to, it is in the disjunctive. Plaintiff's position is correct.

Paragraph (5) deals with the gypsum specifications and gives plaintiff the option, if the gypsum shall not be within 2 per cent of such specifications, either to refuse to accept and pay for such gypsum, or to accept it and pay therefor ten cents per ton less for each per cent which the said gypsum falls below such specifications. The question is

whether plaintiff may deduct a fraction of ten cents for each fractional per cent that the gypsum falls below the contract standard. The simple language of the contract requires a negative answer. This agreement was carefully drawn by able counsel. It seems obvious that if the parties had wished to allow fractional deductions for fractional percentages, the contract would have so specified.

Plaintiff has also asked the court to declare the proper method of taking gypsum samples for analysis. Since gypsum is shipped and stored in bulk, a composite sample taken from the aggregate quantity shipped each day will provide a fair analysis of the quality of such shipment. [167]

Findings of fact, conclusions of law and judgment have heretofore been filed. This memorandum has been prepared to indicate the reasons for the court's decision.

Dated: May 3, 1948.

MICHAEL J. ROCHE,  
United States District Judge.

[Endorsed]: Filed May 3, 1948. [168]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Notice is hereby given that Pacific Portland Cement Company, the plaintiff above-named, hereby appeals to the Circuit Court of [169] Appeals for the Ninth Circuit from those portions of the final

judgment entered in the above-entitled cause on the 26th day of April, 1948, numbered and reading as follows:

“It Is Ordered, Adjudged and Decreed as Follows:

\* \* \* \*

2. That the terms ‘cost of production’ and ‘cost of manufacture’ as used in paragraph (6) of said contract are synonymous and are not limited to ‘actual’ or ‘direct’ costs; that said terms ‘cost of production’ and ‘cost of manufacture’ include overhead expense and indirect charges which cannot be directly charged to or against each of the various products produced by defendant at its Newark, California, plant, and which must, therefore, be allocated to or apportioned among such products on some reasonable basis.

3. That defendant’s cost of production of gypsum as determined by defendant from time to time and the resultant increases in price established by defendant from time to time have been in accordance with the terms and provisions of said contract, and such costs so determined by defendant and the resultant prices to which defendant became entitled were as follows:

Period	Cost of Production
From July 1, 1939, to June 30, 1940.....	\$1.66 per ton
From July 1, 1940, to June 30, 1941.....	1.84 per ton
From Jan. 1, 1942, to Dec. 31, 1942.....	1.93 per ton
From Jan. 1, 1943, to Dec. 31, 1943.....	2.71 per ton
From July 1, 1944, to June 30, 1945.....	2.52 per ton
From July 1, 1945, to June 30, 1946.....	3.12 per ton

Period	Price
From Oct. 5, 1941, to Sept. 4, 1946.....	\$2.98 per ton
From Sept. 4, 1946, to Nov. 13, 1946.....	3.76 per ton
From Nov. 13, 1946.....	4.36 per ton
* * * *	

5. That for the purpose of determining the conformity or non-conformity to the requirements of paragraph (5) of said contract of gypsum sold and delivered by defendant to plaintiff pursuant to said contract such gypsum should, in accordance with the provisions of said contract, be analyzed from samples taken at the plant of defendant at Newark, California, and as of the condition of such gypsum at that point, and for the purpose of such analysis a composite sample of each shipment of gypsum made by defendant to plaintiff affords a fair and proper criterion of the gypsum delivered by defendant pursuant to said contract, and such method of sampling and analysis is in accordance with the terms and provisions of said contract; that the aggregate quantity of gypsum shipped by defendant from its Newark, California, plant, to plaintiff in the course of a 24-hour day shall constitute a 'shipment' as such term is used hereinabove in this paragraph. [170]

6. That the provisions of paragraph (5) of said contract mean that in the event that the gypsum content of gypsum sold and delivered by defendant to plaintiff, pursuant to said contract, and determined as in the preceding paragraph hereof provided, falls below 95.51%, plaintiff is entitled to deduct from the contract price of such gypsum the amount of 10c per ton for each full per cent, to the exclusion of fractional per cents, that the gyp-

sum content falls below 97.51%, and plaintiff is not entitled to fractional deductions for fractional percentages.

\* \* \* \*

8. That plaintiff is not entitled to judgment against defendant for the sum of \$9,405.93, or any other sum.

9. That the respective parties shall pay their own costs.”

Dated: San Francisco, California, the 25th day of May, 1948.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

[Endorsed]: Filed May 25, 1948. [171]

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, Pacific Portland Cement Company, a California corporation, [172] as principal, and Associated Indemnity Corporation, as surety, are held and firmly bound unto Westvaco Chlorine Products Corporation, a corporation, in the sum of two hundred and fifty dollars (\$250) to be paid to the said Westvaco Chlorine Products Corporation, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, by these presents.



Sealed with our seals and dated this 25th day of May, 1948.

Whereas on the 26th day of April, 1948, a judgment was entered in the above-entitled cause by the District Court of the United States for the Northern District of California, Southern Division, and Pacific Portland Cement Company has filed in the said court a notice of appeal from certain portions of said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such, that if the aforesaid judgment is affirmed or modified by the appellate court, or if the appeal is dismissed, and Pacific Portland Cement Company shall pay all costs which may be awarded against it on said appeal, then this obligation to be void; otherwise to remain in full force and effect.

[Seal]                    **PACIFIC PORTLAND  
CEMENT COMPANY,**  
Principal.

By /s/ C. B. FLICK,  
Vice President.

[Seal]                    **ASSOCIATED INDEMNITY  
CORPORATION,**  
Surety.

By /s/ JACK C. POOLE,  
Attorney in Fact.

Attest:

/s/ SCHOENING, Asst. Secretary.

[Certificate of Acknowledgment by Jack C. Poole attached.]

[Endorsed]: Filed May 25, 1948. [173]



[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, Pacific Portland Cement Company, appellant, upon an [174] appeal herein to the Circuit Court of Appeals for the Ninth Circuit, hereby designates to be contained in the record on appeal the complete record and all the proceedings and evidence in the action; including inter alia the following:

1. Complaint;
2. Motion and Notice of Motion for Order for Deposit in Court, together with Memorandum of Points and Authorities, and Order Shortening Time for hearing of said motion;
3. Order for Deposit in Court dated March 14, 1947;
4. Answer;
5. Plaintiff's Reply to Counterclaims;
6. Interrogatories Propounded to Defendant;
7. Reply to Interrogatories Propounded to Defendant by Plaintiff;
8. Motion and Notice of Motion for Order Compelling Further Answers to Interrogatories;
9. Motion and Notice of Motion for Production, Inspection and Copying of Documents;
10. Order for Refund out of Deposit in Court and for Reduction of Further Deposits, dated September 19, 1947;
11. Further Reply to Interrogatories;

12. Amendment to Plaintiff's reply to Counterclaims;

13. Motion and Notice of Motion for Production, Inspection and Copying of Document, including Memorandum of Points and Authorities.

14. Order for Discovery, Inspection and Copying of Documents, dated December 1, 1947.

15. Notice to Produce Original Documents, dated December 4, 1947. [175]

16. Stipulation for Compromise and Dismissal of Defendant's First Counterclaim;

17. Order for Entry of Judgment, dated March 30, 1948;

18. Motion and Notice of Motion for Order Terminating "Order for Deposit in Court" and Authorizing Withdrawal and Payment to Defendant of Money on Deposit;

19. Draft of Judgment Presented by Defendant, and Plaintiff's Objections thereto;

20. Draft of Judgment Presented by Plaintiff, and Defendant's Objections thereto;

21. Plaintiff's Proposed Findings of Fact and Conclusions of Law;

22. Findings of Fact and Conclusions of Law Proposed by Defendant.

23. Plaintiff's Proposed Amendments to Defendant's Draft of Findings of Fact and Conclusions of Law;

24. Plaintiff's Proposed Modification of Defendant's Draft of Judgement;

25. Defendant's Proposed Amendment of Findings of Fact and Conclusions of Law Prepared by Plaintiff;

26. Findings of Fact and Conclusions of Law;
27. Judgment;
28. Stipulation and Order re Payments under Contract and re Stay of Judgment;
29. Memorandum Opinion, dated May 3, 1948;
30. Notice of Appeal with date of filing;
31. Bond for Costs on Appeal;
32. This Designation of Contents of Record on Appeal;
33. The Reporter's Transcript of the evidence and [176] proceedings at the trial of the cause;
34. All exhibits marked for identification or received in evidence at the trial of the cause;
35. The depositions of Stanley H. Barrows, taken October 25, 1947; of James H. Colton, taken October 24, 1947, and L. O. Bannard, taken November 1, 1947;
36. Stipulation for Transmittal of Original Exhibits;
37. Clerk's Certificate.

Dated: San Francisco, California, the 8th day of June, 1948.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff and  
Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed June 10, 1948. [177]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL OF  
ORIGINAL EXHIBITS

It is hereby stipulated by the parties hereto that all the exhibits marked for identification or received in evidence [178] in the above-entitled cause, all the depositions, and the reporter's transcript of the evidence and proceedings at the trial shall be transmitted by the clerk in their original form to the Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal, in lieu of copies thereof.

Dated: San Francisco, California, June 8, 1948.

/s/ PILLSBURY, MADISON &  
SUTRO,

/s/ EUGENE D. BENNETT,

/s/ MAURICE D. L. FULLER,

/s/ WALLACE L. KAAPCKE,

Attorneys for Plaintiff.

/s/ BACIGALUPI, ELKUS &  
SALINGER,

/s/ CLAUDE N. ROSENBERG,

/s/ TADINI BACIGALUPI,

Attorneys for Defendant.

It Is So Ordered.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed June 10, 1948. [179]

[Title of District Court and Cause.]

ORDER UNDER RULE 73(g) EXTENDING  
TIME FOR FILING RECORD ON APPEAL  
AND DOCKETING ACTION

Whereas plaintiff, Pacific Portland Cement Company, on May 25, 1948, filed herein a written notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from [180] certain portions of the final judgment of this court entered into this action on April 26, 1948;

Now, Therefore, good cause appearing therefor, it is hereby Ordered, under Rule 73(g) of the Federal Rules of Civil Procedure, that the time for the docketing of this action in the United States Circuit Court of Appeals for the Ninth Circuit and for the filing of the record on appeal herein be and it is hereby extended to ninety (90) days after the filing of said notice of appeal, that is to say, to and including August 23, 1948.

Dated: July 1st, 1948.

MICHAEL J. ROCHE,  
United States District Judge.

The foregoing order may be entered by consent.

/s/ BACIGALUPI, ELKUS &  
SALINGER,  
Attorneys for Defendant.

[Endorsed]: Filed July 1, 1948. [181]



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 26934 R

PACIFIC PORTLAND CEMENT COMPANY, a  
California Corporation,

Appellant,

vs.

WESTVACO CHLORINE PRODUCTS CORPO-  
RATION, a Corporation,

Appellee.

ORDER EXTENDING TIME TO FILE REC-  
ORD ON APPEAL AND TO DOCKET  
APPEAL

Upon the application of appellant, Pacific Portland Cement Company, and the stipulation and affidavit filed therewith, and good cause appearing therefor, it is hereby Ordered that the time for filing in this court the record in the above-entitled cause (the action bearing Civil No. 26934-R in the District Court of the United States for the Northern District of California, Southern Division), and the time for docketing the appeal herein, be and it is hereby extended to and including September 30, 1948.

Dated: August 13, 1948.

WILLIAM DENMAN,

Senior Circuit Judge.

A True Copy. Attest: Aug. 1, 1948. Paul P. O'Brien, Clerk. Frank H. Schmidt, Deputy.

[Endorsed]: Filed August 14, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: Filed August 18, 1948. C. W. Calbreath, Clerk. [182]

District Court of the United States, Northern  
District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 182 pages, numbered from 1 to 182, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Pacific Portland Cement Company, a California Corporation, Plaintiff, vs. Westvaco Chlorine Products Corporation, a Corporation, Defendant, No. 26934-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$30.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 29th day of September, A.D. 1948.

[Seal]

C. W. CALBREATH,  
Clerk. [183]

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Michael J. Roche, Judge.

No. 26,934-R

PACIFIC PORTLAND CEMENT COMPANY, a  
California Corporation,

Plaintiff,

vs.

WESTVACO CHLORINE PRODUCTS CORPORATION, a Corporation,

Defendant.

### REPORTER'S TRANSCRIPT

Monday, December 8, 1947

Appearances—For Plaintiff: Messrs. Pillsbury, Madison & Sutro, by Eugene D. Bennett, Esq. and Wallace L. Kaapcke, Esq.

For Defendant: Messrs. Bacigalupi, Elkus & Falinger, by Tadini Bacigalupi, Esq. and Claude N. Rosenberg, Esq., and Kenneth Ray, Esq. [1\*]

Mr. Bennett: May we stipulate that the Reporter prepare a daily transcript and that the cost of the original copy of the transcript which will be furnished to Your Honor be taxed as cost in the case?

Mr. Rosenberg: So stipulated.

The Court: Very well. We will take an adjournment until 2:00 o'clock this afternoon.

(Whereupon an adjournment was taken until 2:00 o'clock P.M. of the same day.) [26]

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\* Page numbering appearing at foot of page of original certified Reporter's Transcript.

C. BRUCE FLICK,

called as a witness on behalf of the plaintiff; sworn.

Mr. Bennett: Well, your Honor, I think a little more knowledge of these matters would be helpful, and I would like to read the deposition, offer in evidence and read the deposition of James S. Colton, a former executive of the Pacific Portland Cement Company, which was taken by the other side.

Mr. Rosenberg: I will object to the reading of the deposition of the witness that is taken as an adverse witness purely for the purpose of discovery. The proper foundation has not been laid. I don't know where Mr. Colton is. I know he is an officer of the company, he should be available.

Mr. Bennett: Will you step down, Mr. Flick?

Mr. Bennett: Mr. Kaapcke, will you take the stand?

WALLACE KAAPCKE,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name?

A. Wallace Kaapcke.

Direct Examination

By Mr. Bennett:

Q. Mr. Kaapcke, you are an attorney at law admitted to practice in the Supreme Court of the State of California and this court?

A. Yes. [44]

Q. Associated with the firm of Pillsbury, Madi-

(Testimony of Wallace Kaapcke.)

son & Sutro, counsel for the plaintiff in this case.

A. Yes.

Q. Do you know Mr. James H. Colton?

A. I do.

Q. The same James H. Colton, whose deposition was taken on Friday, October 24, 1947, in this case?

A. That is the person you refer to.

Q. Do you know where Mr. Colton resides?

A. He resides in Reno, Nevada.

Q. Do you know whether he is there at this time?

A. He is there at this time.

Q. Have you had communication with him during the last 24 hours?

A. I talked to him yesterday afternoon on the telephone and he was then at his home in Reno.

Q. Did he say anything at that time with reference to his intention to be in Reno, Nevada?

A. He said that he would be in Reno all week, all of this week.

Q. Did you communicate or did you endeavor to communicate with Mr. Colton today?

A. Within the half hour I tried to reach him at either his home or his office in Reno, but the report back from the Long Distance operator was that he was away from his office for a short period and would be there when exactly she did not know, [45] but some further time during the afternoon.

Q. During this afternoon?

A. Yes.

Mr. Bennett: That is all, Mr. Kaapcke.



(Testimony of Wallace Kaapcke.)

Cross-Examination

By Mr. Rosenberg:

Q. Mr. Kaapcke, what is Mr. Colton's position with Pacific Portland Cement Company?

A. I know only from what he said when he testified at his deposition. I understand that as an active employee he is retired, but he still maintains the position and title of vice president, and a member of the board of directors.

Q. When you spoke to him yesterday did you ask him if he would come to San Francisco for the purpose of testifying in this trial?

A. I asked him if he were able to come, what his arrangements were about coming down here, and he said he was not able to make a reservation on the train.

Q. Did he say he would be willing to come if you wanted him here?

Mr. Bennett: Well, there is no question of that, counsel. I object to the question. It is not a matter of whether he is willing to come. If the court would evidence the desire of Mr. Colton coming here, appearing in person, we can obtain Mr. Colton. He is an elderly man and is retired from all active work with the plaintiff corporation, and has some little [46] business, wholesale building supply business up in Reno. That is and has been for some time his home. The only reason I put this witness on the stand was to answer any question of the application of the rules that would permit the reading of this testimony in evidence. This

(Testimony of Wallace Kaapcke.)

was a deposition, it is true, that was taken by the defendant. However, the rules provide that a deposition of this kind can be read or put in evidence at the time of the trial by either party. Now, Mr. Colton is more than 100 miles away from the court. In view of the fact this deposition is largely cross-examination by the others, it does seem to me the defendant wouldn't in any way be prejudiced by the reading of this deposition in evidence. I know of no rule of law that would exclude it, and particularly as this witness has shown to the court now that Mr. Colton is more than 100 miles away from the place of court.

Mr. Rosenberg: If the Court please, it is my understanding that this is a deposition that was taken at the instance of the defendant, who examined Mr. Colton as an adverse party. As a result, we were entitled to inquire into anything that was relevant to the issues of the case, and the deposition was taken, as I say, for the purpose of discovery. The witness is an officer, vice president and member of the board of directors of the corporation, and if his testimony is to be elicited in this case he is available, I believe it should be done by direct examination and then cross-examination, based [47] upon the direct, and not cross-examination under the adverse witness rule, where we inquire into a lot of things and to which I would make objection if the testimony were elicited in the course of this trial, and it is the first time I have heard of a deposition of an adverse witness

(Testimony of Wallace Kaapcke.)

being offered in evidence by the other side. We are not bound by the testimony.

Mr. Bennett: You may not be bound by this testimony, but we are entitled to offer it. Counsel has stated nothing, your Honor, that I know of by reason of law why this deposition is not admissible in evidence as such, subject, of course, to any motion that may be made or objection that may properly be taken to any question or answer that is given.

Mr. Rosenberg: May I just consult the rules for a minute? I think it is clear under the rule, I am referring to Rule 26(d) which says:

“At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present, or represented at the taking of the deposition, or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.” [48]

Obviously that is not the purpose.

“(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.”

(Testimony of Wallace Kaapcke.)

We are the adverse party, so it obviously does not come under that.

“(3) The deposition of a witness, whether or not a party, may be used by any party for the purpose if the court finds: 1, that the witness is dead; or, 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to testify because of age, sickness, infirmity, or imprisonment; or, 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or, 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

“(4) If only part of a deposition is offered in evidence [49] by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.”

Now, I submit that a party is free to take a deposition under the discovery rules and then it is up to him to determine whether he is going to offer that deposition in evidence, and where the witness is an officer and a director of the corporation that is a party, unless they can show that the witness is not available, and then I am not sure that they

(Testimony of Wallace Kaapcke.)

can produce that deposition that was taken by the parties as an adverse witness. This is the first time I have ever been up against this, if the Court please, but I think it is logical and under the rule it is apparent if the witness is available they can bring him in. There may be questions I want to ask him. This deposition was not taken, necessarily, for the purpose of using it in evidence. It was taken purely for the purpose of discovery.

Mr. Bennett: Well, you run that risk, Mr. Rosenberg. As I read the rule, we still entitled ourselves——

The Court: Read the rule that you rely on.

Mr. Bennett: This is Rule 26, subdivision (d) (3):

“The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead, or, 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, [50] unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment, or, 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.”

It seems to me that under this rule there has been no showing that we have purposely procured the absence of the witness from the jurisdiction of



(Testimony of Wallace Kaapcke.)

the court. I think there are some cases on this. Rather than delay the matter, at this juncture I would rather defer the deposition and put on Mr. Flick so we can go on with the trial. My purpose in offering the deposition, which was a deposition taken where cross-examination was permitted under the rules and they could not very well complain of that. Your Honor recalls when you were out in the Superior Court under 2055, I know it was always a practice of George Ford, who took the deposition of an adverse party, why, he would always read that deposition in evidence, and the practice has been so well established, and nobody ever objected to it. Step down, Mr. Kaapcke. Perhaps by tomorrow morning I can supply your Honor with authorities on that.

C. BRUCE FLICK,

recalled.

The Clerk: Will you state your name?

A. C. Bruce Flick. [51]

Direct Examination

By Mr. Bennett:

Q. What is your position with the plaintiff, Pacific Portland Cement Company?

A. I am a vice president, and I am also the secretary and treasurer.

Q. How long have you held that position?

A. I have been secretary-treasurer of the company since June of 1944, and I have been a vice president since May, 1945.

((Testimony of C. Bruce Flick.))

Q. Before that, what was your position?

A. With Pacific Portland Cement Company, I went with Pacific Portland Cement Company the 1st of July, 1942, as an assistant to the president, and the first of July, 1943, I became controller and continued as controller until June, 1944.

Q. I am going to back up a moment, your Honor, and ask the witness for his preliminary and previous experience, to qualify him, as he happens to be a certified public accountant.

Q. Will you relate briefly, Mr. Flick, for the benefit of his Honor, the training and experience you have had in the business world, including your particular course of studies, if any, at a university or college?

A. I went to the University of California, graduating in the class of 1922 with the degree of Bachelor of Science in Commerce, with a major in accounting. One of my instructors there was John F. Forbes, who was quite a well-known accountant in San Francisco, and at that time Mr. Forbes was the Pacific Coast [52] partner of Haskins & Sells.

Q. After leaving college——

A. After leaving college, after I graduated, Mr. Forbes gave me my first employment in public accounting with Haskins & Sells. I continued with Haskins & Sells for a couple of years, and then I became accountant for the Construction Company of North America, and in March of 1925 I became secretary of the Old Mission Portland

(Testimony of C. Bruce Flick.)

Cement Company, and had charge of the accounting. In July, I think it was, 1927, I left the Old Mission Portland Cement Company and went with the American Trust Company, and companies affiliated with American Trust. I was with the Stock and Bond Affiliate, the American National Company. I was secretary of the American Company which owned the American Trust Company, which in turn was owned by Goldman Sachs, of New York. I was secretary and had charge of accounting and finance and legal matters of a number of companies affiliated with the American Trust Company.

In June of 1936 I became assistant treasurer of the Hawaiian Pineapple Company, and continued as assistant treasurer up until 1940 when I was assigned to Honolulu by the Hawaiian Pineapple Company as controller, as well as assistant treasurer. I resigned from Hawaiian Pineapple Company and came back to San Francisco three months after the attack on Pearl Harbor, and then after a short vacation I went with Pacific Portland Cement Company. [53]

Q. After you became employed by Pacific Portland Cement Company did you become familiar with the contract between Pacific Portland Cement Company and the California Chemical Company, whose property and plant at Newark were later taken over by the defendant, Westvaco Chlorine Products Corporation, the contract of July 29, 1937, providing for the sale of gypsum?

A. Yes, I became quite familiar with that contract.

(Testimony of C. Bruce Flick.)

Q. What did you have to do, or, rather, what was the relation of your duties to anything pertaining to that contract?

A. One of my duties as controller, after I became controller in July, 1943, one of my duties was to see to it that when the company had a contract that it obtained whatever benefits it was entitled to under the contract, and also that it performed whatever obligations it had by way of follow-up.

Q. You were not employed by the company at the time of this first price increase, or notice of price increase which was dated in August, 1941, to be effective October 5, 1941?

A. No, I was not employed in 1941.

Q. You became aware, however, shortly after your employment, of the fact that the contract price of \$2.80 had been increased to the sum of \$2.98 by reason of claimed increased costs of the manufacture of—actual increased costs of the manufacture of gypsum?

A. Yes, I became aware when I first went into the Pacific Portland Cement Company of the fact we were paying \$2.98 a ton [54] at the time.

Q. I show you here a copy of a letter at the top of which is stated, "Westvaco Chlorine Products Corporation, Newark, California, October 2, 1941," addressed to Pacific Portland Cement Company, 417 Montgomery Street, San Francisco, California, Attention A. H. Canvin, Secretary, and purports to be signed by Westvaco Chlorine Prod-

(Testimony of C. Bruce Flick.)

ucts Corp., O. H. Hurlbert, Chief Accountant, and ask you whether you shortly after you became employed by the company saw the original of that letter, and its attached sheet or schedule that is attached to that copy.

A. Yes, I have seen the original of which this appears to be a copy.

Q. They were in the files of the Pacific Portland Cement Company?

A. Yes, they were in Mr. Canvin's files.

Q. You saw this in 1942, did you?

A. I would say probably in 1943, possibly in 1942.

Q. Was it prior to any further notice of price increase that you were apprised of the contents of this letter of October 2, 1941, and its accompanying tabulation and list?

A. Was it prior to further——

Q. Prior to the second——

A. The second price increase, we were given verbal intimation in the latter part of 1943 that Westvaco's costs were going up [55] and that we could expect they would demand an increase in price and they actually made such a demand about the 1st of January, 1944.

Q. Was it before or after that that you first saw this letter from Mr. Hurlbert, giving the details of that first increase of 18 cents per ton?

Mr. Rosenberg: I understood the witness has said it was in 1942 or 1943. This is a letter of 1944.

The Witness: No, no. This is a letter of 1941.



(Testimony of C. Bruce Flick.)

Mr. Rosenberg: But you are talking about was it before or after the notice of increase which was in the letter of January 14, 1944?

The Witness: I believe I was asked whether I first saw this 1941 letter before or after the notice in January, 1944.

Mr. Bennett: That's right.

Mr. Rosenberg: You were first asked when you saw it and you said 1942 or 1943. Is that right?

Mr. Bennett: Yes; that was my understanding, but to be sure about it, you saw this letter of October 2, 1941, from Mr. O. H. Hurlbert, either in 1942 or 1943.

A. I think it was in 1943, but at any rate it was in the file of the company, in Mr. Canvin's files, and whenever I went into his files in general reference to the Westvaco contract I have no doubt I saw that particular letter.

Mr. Bennett: I would like this letter to be offered in [56] evidence at this time as plaintiff's exhibit.

The Court: Admitted and marked.

(The letter was marked Plaintiff's Exhibit 1 in evidence.)

The Court: It is time for a recess.

(Recess.)

Q. (By Mr. Bennett): Mr. Flick, I fear I have failed to ask you, you are a certified public accountant, are you not, as such by training?

A. Yes, I am. I have been a certified public accountant since about 1925 or '26.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Your Honor, this letter has been referred to. I would like to read it for the record. This is the letter from the defendant concerning the details of this first increase of 18 cents. The date of it is October 2, 1941.

“In accordance with request of yourself and J. H. Colton, while in conference with Mr. Wallace yesterday, we have analyzed gypsum production costs for the years ending June, 1940, and June, 1941. We are attaching hereto a recapitulation of labor, material and power costs which accounts for 15 cents per ton of the 18 cents per ton increase of which you have been previously notified, and which increase is effective October 5, 1941.

“If you desire further information in re the attached statement, or in connection with our basis of determining increase in cost, please call on the writer. [57]

“Yours very truly,

“WESTVACO CHLORINE  
PRODUCTS CORP.,

“O. H. HURLBERT,

“Chief Accountant.”

Attached to the letter is a sheet entitled, “Gypsum Manufacturing July, 1939-June, 1941,” showing the two respective periods; July, 1939, to June, 1940, the cost per ton of these three items, which we conceded and told your Honor were direct and proper items of cost, and for the period July, 1940, to July, 1941, it shows at the bottom a total cost for these three items referred to of

(Testimony of C. Bruce Flick.)

15 cents per ton, broken down to 2 cents increase in labor, 10 cents increase in material, and 3 cents increase in power.

### GYPSUM MANUFACTURING

July, 1939—June, 1941

		Labor	Material	Power
1939	July .....	595.71	187.36	259.86
	August .....	522.25	99.07	196.41
	September .....	712.57	212.74	249.90
	October .....	551.29	155.35	230.82
	November .....	629.07	288.98	222.69
	December .....	757.34	271.54	102.03
1940	January .....	555.05	210.13	197.82
	February .....	656.41	324.74	280.90
	March .....	885.76	377.33	388.13
	April .....	684.51	348.09	280.43
	May .....	776.73	370.54	265.20
	June .....	1,019.47	545.03	389.82
Total .....		8,346.16	3,390.90	3,064.01
Tons Produced 27,685: per ton (.30)			(.12)	(.11)
1940	July .....	702.68	290.69	308.62
	August .....	629.77	269.07	302.64
	September .....	864.02	234.17	409.38
	October .....	864.42	466.64	285.98
	November .....	765.49	990.02	327.12
	December .....	971.85	1,115.50	418.33
1941	January .....	1,120.64	1,310.28	290.06
	February .....	797.56	292.09	349.56
	March .....	945.41	876.01	420.68
	April .....	655.73	426.02	351.61
	May .....	771.64	295.11	388.09
	June .....	1,276.99	339.26	473.42
Total .....		10,366.20	6,904.86	4,325.49
Tons Produced 32,000: per ton (.32)			(.22)	(.14)
Increase .15 .....		(.02)	(.10)	(.03)

(Testimony of C. Bruce Flick.)

Q. Mr. Flick, what was your understanding when you first saw this letter, this letter and the attached memorandum of compilations, the attached memorandum, as far as whether there was any charge for or claimed charge for items other than direct cost of manufacture?

Mr. Rosenberg: I object to that as incompetent, irrelevant and immaterial, the document speaks for itself. I don't think we are particularly concerned with this individual's understanding in reference to that. He can testify as to what he received and what was written him by Westvaco, or anything of that sort, but I don't see the pertinency or the materiality of the mental understanding of this witness. [58]

Mr. Bennett: I can answer that very directly. As counsel stated to you, they are defending on the theory that there was an estoppel, and the notice of the first raise of 1941 of 18 cents which included both direct and indirect charges, and we went ahead and paid on that notice, thus recognizing what would amount to construction of the accounts as contended for by the defendant. The letter, itself, shows quite on the contrary, there is nothing in the letter that in any way suggests or intimates that there is any indirect charge included in this 18 cents. On the contrary, it shows that the 15 cents of the 18 cents was all for direct costs, and which we have not disputed. I want to show your Honor at this time that Mr. Flick, who had taken over the operation of the plaintiff corpora-

(Testimony of C. Bruce Flick.)

tion in so far as this contract was concerned, understood that there was nothing, and there was nothing to make him understand to the contrary that this 18 cents was anything other than direct costs of manufacture——

The Court: Well, I suggest that you develop the facts; what, if anything, he did in relation to this document. Your question was a compound question.

Mr. Bennett: Perhaps my question was not in good form, if the court please.

Q. Did you have any knowledge at the time that you first had in charge or had to do with the pricing or operations of the contract in issue, this contract of January 29, 1937, as to [59] whether prior to that time, in August, 1941, when the first price raise was claimed by the defendant, or up to the time you first took charge of the matter, as you have testified, that there had been any claim made by the defendant in this 18-cent price raise for increased indirect costs?

A. Well, when I first looked into this contract and reviewed the contract to familiarize myself with it and then examined whatever files were available in connection with the contract which Mr. Canvin, as Secretary and Treasurer had in his office, the only thing that Mr. Canvin had in his file was these direct figures for labor, material and power, and he had nothing in his files to show any general allocations of overhead, or any indirect charges or anything of that kind. The price had gone up



(Testimony of C. Bruce Flick.)

from \$2.80 to \$2.98, and there was an 18-cent increase. Here was a statement that showed a 15-cent increase in these direct charges. I understood from Mr. Canvin that——

Mr. Rosenberg: Just a moment.

The Court: What you understood may go out.

The Witness: May I say, I discussed with Mr. Canvin——

Mr. Bennett: You can say you discussed it with Mr. Canvin, but counsel is objecting to anything Mr. Canvin said to you.

The Witness: You mean I am not permitted to say what Mr. Canvin told me?

The Court: In the legal terms, that is hearsay evidence.

The Witness: Well, going over the files, that is something actual which I did, was to examine the files that were available [60] in connection with the contract, and in going over the files it was all I found in the way of a statement of the figures; that stipulated a price, in other words, of 18 cents. There was nothing in the files about any overhead charges, or any indirect charges or anything of that sort. I found nothing in the files to show any further details had been furnished or had been requested than 15 cents of the 18 cents was for these direct charges.

Mr. Rosenberg: May I have the question read? I take it the answer is "No."

(Question read by the reporter.)

The Witness: I had no knowledge they were

(Testimony of C. Bruce Flick.)

claiming anything on overhead or that there were any items of overhead involved, or that there were any items of overhead in the 18-cent figure.

Q. (By Mr. Bennett): When was the first time you had any knowledge or intimation of any kind that the defendant claimed or asserted that their first increase of 18 cents included anything other than the direct items of charges for the manufacture of gypsum?

A. Well, the first time I had any information was when I first examined figures at Westvaco's plant in January, 1944. At that time I examined their figures for 1943, and 1942, and having nothing in our files comparable to what they were then showing me, this one with a lot of overhead allocations in 1943 or 1942, I asked them to furnish me the similar figures [61] for the previous period, so I could see whether they made changes, apparent changes in their accounting method, or not, and I think it was in January, 1944, that is the first time I knew they were claiming to have it on the books. I never examined their books.

Q. At that time you were willing to pay that price for increased cost even based on \$2.98?

A. They claimed that their costs had gone up.

Q. You mean after the first price?

A. After the first price, increase of 18 cents. That price was \$2.98 that was being paid when I came back in the cement company in 1942 and continued to be paid through 1942 and 1943. The OPA had gone into effect on most commodities and set

(Testimony of C. Bruce Flick.)

March, 1942, ceiling prices. The OPA took over control and froze the price at 2.98. They claimed the costs had gone up in 1942 and 1943. I went down there in January, 1944, and examined their figures they presented to me, and I tried to look at the basis of indicating their labor and power and natural gas, fuel, direct costs of producing, which indicated to me that they were entitled to an increase of 29 cents on account of these two charges.

Q. 29 cents above the \$2.98 price?

A. Yes.

Q. That you had been paying?

A. Yes. I personally would proceed to recommend a price of \$2.98 [62] plus 29.

Q. Or \$3.27?

A. So with the OPA having already frozen their price at 2.98 we could not pay the \$3.27 even though we wanted to, and they could not receive it even though they wanted it. There was no object at that time in going back and trying to reopen the 2.98 price. [62-a]

Mr. Rosenberg: I am going to object to this form of testimony, Your Honor. This is not responsive to any question. I want to know what question he is answering now.

Mr. Bennett: I am trying to get the facts in without asking little short questions. The witness is now testifying in answer to your contention that we had been advised that there were indirect charges paid without any opposition. The witness is testifying as to what he did and why.

(Testimony of C. Bruce Flick.)

The Court: Proceed. Reframe your question. The Reporter left or I would have him read the question and answer.

Q. (By Mr. Bennett): As I understand it, then, until you were advised in 1944 that they were claiming an increase based upon indirect items of cost as well as the 29 cents direct cost, which you are willing to accept, you had not had any knowledge or intimation of any kind or character that the defendant had claimed at any time or was claiming at any time or was asserting that any indirect cost should be included in the price that you should pay for this gypsum?

A. I had no knowledge of their claims of indirect cost and overhead and so forth until I went down there and made the examination in January, 1944.

Q. The total claim of that second price raise was 78 cents, was it not, Mr. Flick?

A. 78 cents, that is correct. They claimed a price of \$3.76.

Q. Now, you found there was a 29-cent item of direct charge. [63] What were the so-called items of indirect charge? Do you have any record or memorandum of that?

A. Well, I have here, if I am permitted to refer to them, to refresh my memory on these figures, working papers which I made at their place at the time. May I refer to these?

Q. These working papers that you say you are now referring to were notes made by you at the

(Testimony of C. Bruce Flick.)

time or shortly after the time you had this conference with the defendant's representatives in 1944?

A. Yes, these are the notes I made at the time in Westvaco's office.

Q. All right.

Mr. Rosenberg: I am not going to make any objection, if the Court please, on the ground it is not the best evidence, as obviously the books are. I might say this, that prior to trial I had discussed with counsel the best means of expediting the trial of this case without bringing in original records and documents, and I am perfectly willing to waive the best evidence rule where I know, as I do know, that Mr. Flick has gone over our records and has made worksheets, but I have not received any reply from counsel, and I am hopeful I will be accorded the same privilege. I think that is a logical and expeditious way to elicit this testimony, but I do not want it to work one way. I would like it to work both ways.

Mr. Bennett: If your Honor please, all this witness is [64] talking about is, he asked whether he could refresh his recollection as to what they claimed or told him at the time.

The Court: He is entitled to refresh his recollection.

Mr. Bennett: That is all.

Q. By the way, Mr. Flick, when you were down there, you did not make an audit of their books, did you?

A. I did not.



(Testimony of C. Bruce Flick.)

Q. Did they offer to let you make an audit of their books?

A. When I first went down they showed me some working sheets containing some figures which purported to be taken from their books. I did not go back and audit their books, check their vouchers, check all the journal entries and everything because I assumed that the figures they were showing me were in fact taken from the books, as they said they were, and I assumed they were honest in their accounting and so forth. I assumed they were not padding the accounts for the purpose of the contract or anything of the sort. So I did not go down there with the idea of doing a lot of checking back of vouchers, original vouchers and that kind of thing, and I did no such checking. They furnished me figures and I took those figures and I discussed those figures.

Q. The figures that they furnished you for this 78 cents claimed increase, you have already stated that the 29 cents you agreed to as being actual or direct cost or the manufacture of gypsum; will you tell the Court what those items amount to and [65] what they cover?

A. The 29 cents?

Q. Yes.

A. The 29 cent increase in direct charges was the difference, the increase from 1942 direct charges of 71 cents to the 1943 direct charges of \$1.00. There was an increase of 29 cents in the direct charges. Those direct charges consisted of operating labor, repair labor, which they told me was

(Testimony of C. Bruce Flick.)

labor on the drying and grinding machinery for the gypsum after it had been precipitated and filtered out, operating labor, materials and supplies for the grinding and drying machines for the gypsum after it had been filtered out, the fuel oil and natural gas required to heat the drier for the gypsum after it had been filtered out, the power required to run the grinding machinery for the gypsum after it had been filtered out, and the workmen's compensation insurance and social security taxes directly relating to the operating labor and repair labor charge, and water necessary in the processing of the by-product gypsum. So those items together aggregated for 1942 71 cents; for 1943, \$1.00, an increase of 29 cents in the direct charges.

Did you ask me also the other items?

Q. Yes. Now, the indirect items that they sought to claim, which amounted to the difference between 29 cents and 78 cents, or 49 cents. What were they, Mr. Flick?

A. The first item is depreciation, which went up from 38.4 [66] cents in 1942 to 45.4 cents in 1943, an increase of 7 cents per ton of gypsum on depreciation. I received no detail on the depreciation because I was informed that the figures were kept in New York and they had no detailed figures here.

The insurance of 1 cent in 1942 and 1.7 cents in 1943, an increase of .7 of a cent per ton.

Taxes, real and personal property taxes, 1.5 cents in 1942; 1.9 cents in 1943, an increase of .4 of a cent.

Laboratory production control and research, 10.5

(Testimony of C. Bruce Flick.)

cents in 1942; 30.4 cents in 1943, an increase of 19.9 cents.

General plant expense, 17.4 cents in 1942; 27 cents in 1943, an increase of 9.6 cents.

Engineering and maintenance supervision, 2.2 cents in 1942, 3.7 cents in 1943, an increase of 1.5 cents.

Purchasing and stores, 2.3 cents in 1942, 4.9 cents in 1943, an increase of 2.6 cents.

Accounting, 4.8 cents in 1942, 7 cents in 1943, an increase of 2.2 cents.

Overhead, 4.9 cents in 1942, 9.3 cents in 1943, an increase of 4.4 cents.

Q. (By Mr. Bennett): That was the item of overhead?

A. Called overhead. I subsequently asked for the detail on that, which I obtained, but these were the initial figures that made up that increase.

Those items altogether were grouped, the item called overhead, [67] the item of laboratory production control and research, general plant expense, engineering and maintenance supervision, purchasing and stores, accounting and overhead, called overhead, those items together aggregated in 1942 42.1 cents, in 1943 82.3 cents, or an increase of 40.2 cents. So that summarizing, we had 28.9 cents for the direct charges—I called that 29 cents a few minutes ago, rounding it out—8.1 for depreciation, insurance and taxes, 40.2 cents for all these overhead items, and .1 of a cent for bittern. Their figures, I may say, do not show

(Testimony of C. Bruce Flick.)

that. They just show 29 cents. There is apparently no increase in bittern. All those items added together show an increase; adjusting for fractions you get a figure of 78 cents, as claimed by them.

Q. Were you told at that time or subsequently how or why those particular amounts of overhead or general or indirect charges were listed in the amounts they listed? A. They told me——

Mr. Rosenberg: May I have the foundation laid so we will know with whom he was talking?

Mr. Bennett: Yes.

Q. To whom were you talking at that time?

A. I went to the Newark plant office of Westvaco in company with Mr. Canvin, who was secretary-treasurer, and Mr. Wallace C. Riddell, who was our chemical engineer at that time, to examine these figures, and we talked with Mr. W. K. Wallace, the [68] Western manager of Westvaco, whose office is at Newark, and with a Mr. Vernon Cuneo, who was their accountant, and I think they called him plant office manager, and the information was given me as to the accounts by Mr. Cuneo and Mr. Wallace, as I recall, was present during all my conversations with Mr. Cuneo.

Now, these charges to overhead were stated to me to be made in accordance with their uniform national accounting system, which is prescribed by their New York office, and which the Newark office carries out, and the basis for allocating these various overhead items is prescribed for them in this uniform national system which Westvaco Chlo-

(Testimony of C. Bruce Flick.)

rine Products Corporation, I was told, follows through in their plants in West Virginia and elsewhere on the Atlantic Coast, elsewhere on the West Coast, and at Newark.

Q. Were you given any details as to why they allocated a certain percentage of overhead or indirect charges to this? Any basis for making such allocations?

A. They allocated their overheads because that is the way they were told to do it by their New York office. They stated that they considered that correct accounting under their uniform system to allocate these overheads to the products that they made.

Q. You were not able at the time to ascertain from their books and records, and assuming that any allocation of so-called indirect or overhead was appropriate in this case, whether the [69] amounts allocated or made were in accordance with the actual operation or they were the result of some arbitrary rule of thumb or other accounting technique.

A. Many of the items which they allocated, of which they allocated a portion to the gypsum production, quite obviously did not arise out of the drying and grinding of this byproduct gypsum. There was one item of new products research for which they charged gypsum, I believe it was, 11 cents a ton, and I could not see how in the world they could justify charging 11 cents a ton to this byproduct gypsum for the allocation of new prod-



(Testimony of C. Bruce Flick.)

ucts research. Their research laboratory was working on products that were completely foreign to gypsum. But that was part of their uniform national accounting system. They charged everything, and so they charged new products research. I could elaborate on that if you wish.

Q. Well, please.

A. Because, for example, they had put on a number of plant guards down there. They had heavy watchman expense because they were making products—this ethylene di-bromide—and they had in one section of their plant a defense plant corporation unit plant which is now being advertised for sale by the Defense Plant Corporation, where they were producing a catalyst for making synthetic rubber, and they had a contract with the Rubber Reserve Corporation. Due to these critical or wartime critical products, they had put on plant protection. They had [70] put on guards and watchmen——

Mr. Rosenberg: Just a minute, Mr. Flick, I want to know what he was told. This witness is giving a lot of conclusions and observations.

Mr. Bennett: I will qualify that, counsel.

Q. Were you told these things when you were down there?

A. I was told everything I am relating. I did not imagine any of this.

Q. Go ahead.

A. So the byproduct gypsum was charged a share of all of this plant protection and whatnot

(Testimony of C. Bruce Flick.)

and the upkeep of the plant grounds. They have a very nice plant down there. It is very beautifully kept. They have nice lawns, shrubbery and flowers, and the production of this byproduct gypsum is charged its proportion of all of that.

Q. That is, you mean they sought to charge it in this second price raise?

A. Yes, they charged it so on their books and so told me that they kept their books that way. They charged plant accounting, the cost of book-keeping; they charged a portion of that to this byproduct gypsum; they charged a portion of purchasing expense, their engineering expense. They charged a portion of their New York office expense. They charged a portion of their West Coast expense, West Coast general expense, West Coast general supervision, West Coast telephone and telegraph, New York office [71] expense, exploration—a portion of exploration is charged to the drying and grinding of this byproduct. Subscriptions and donations, production cost control, cost accounting and statistics, personnel department expense, taking care of Selective Service deferments, and so forth, and hiring new employees. I might say in this case I am now relating I took notes in my conversations with Mr. Cuneo. I made a pencilled carbon copy at the time I noted these things in my conversation and I left with Mr. Cuneo the carbon copy so that subsequently we would have no misunderstanding as to what he told me and what I took away with me.

(Testimony of C. Bruce Flick.)

Group insurance. So their general principle, as prescribed under their uniform accounting system, was to allocate a portion of this byproduct gypsum of every kind of overhead and indirect expense.

Q. The first time, however, that you knew that that was their policy was when you went down to the plant and had this first talk with Mr. Cuneo in 1944?

A. That is correct. That is the first time that I found out what they were charging on their books.

Q. But up to that time there was nothing in your files or in your dealings with the Westvaco people or with your own associates in Pacific Portland Cement Company that indicated in any way that at any time Westvaco had claimed or were claiming the right to increase its price under this contract by any [72] increase of price in these so-called indirect items of the character that you have mentioned?

A. I had absolutely no information as to all of this detail, which I obtained for the first time when I went there in January, 1944, and on subsequent requests for information, which they furnished.

Q. To be certain now, Mr. Flick, that was the first time that you had any knowledge or intimation that Westvaco contended or claimed the right to make an increase in price because of any such so-called indirect charge?

A. That is correct.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Mr. Bennett, you yourself have so testified. I submit the question has been asked and answered three times. It is leading and suggestive and argumentative.

Mr. Bennett: I did not mean to transgress the rule there, but you complained before that the witness was not answering specifically and categorically the questions I asked, and I thought I might anticipate the objection by asking these questions.

Mr. Rosenberg: That does not answer the objection.

The Court: It is fair to say that they are slightly leading and suggestive.

Mr. Bennett: Maybe it was, but I did that, Your Honor, with the idea that it could overcome what I anticipated might be another comment from counsel. [73]

A. May I add just one more thing from my notes as to what Mr. Cuneo told me about their accounting?

Q. Yes.

A. Mr. Cuneo stated to me that they were not charging to the byproduct gypsum any cost of any of the processing previous to the point of separation of the byproduct gypsum.

Q. Subsequently and after you had a chance to go over those figures and review the matter again, did you raise any question with the defendant Westvaco as to the propriety of these charges totaling 49 cents for the items, indirect and otherwise, that you have mentioned here?

(Testimony of C. Bruce Flick.)

A. We raised a question almost immediately. I may say at the time I examined the figures at Newark in my capacity as controller, my job on that occasion was to get the information and not to raise questions and enter into questions with them. I was purely there for the purpose of fact finding, to get the information and come back and report to my superiors, and Westvaco gave us a letter, I believe, dated January 14, 1944, informing us their costs had gone up 78 cents and after March 15, 1944, the new price would be \$3.76, and they requested, because the OPA price controls would prevent any such price increase, they requested us to join them in applying to the OPA for an increase in the maximum price from \$2.98 to \$3.76.

I talked with Mr. Wallace of Westvaco on January 26, 1944, by telephone, and Mr. Wallace told me that they wanted us to [74] join with them in the OPA application, and I asked him what form they visualized our participation in it would take, and he said that they wanted to get us to write a letter to the OPA saying we would not object to the increase because it was justified under this escalator clause in our contract, and I said that it might be all very well to ask OPA for authority for a maximum price of \$3.76, but we had some questions as to the accounting charges, and even though a 78 cent increase might be the maximum to be asked from OPA, that we would have to determine what lesser price would be proper. Under



(Testimony of C. Bruce Flick.)

OPA regulations you could always charge a lesser price than the maximum. Then on February 4 we wrote a letter to Westvaco in which we set forth in writing that Westvaco had shown us that this 78 cents was composed of direct cost, 29 cents, and these other items, and we raised the question in that letter as to the propriety of these other charges.

Q. Now, so we can get some of the letters in evidence which you have mentioned,—(to Mr. Rosenberg), have you seen this letter of the 14th?

Mr. Rosenberg: Yes.

Mr. Bennett: I will offer in evidence a letter of January 14, 1944, from Westvaco Chlorine Products Corporation to Pacific Portland Cement Company, informing us in writing of this claimed increase of 78 cents.

The Court: Let it be admitted and marked. [75]

Mr. Bennett: I understand counsel would be willing to have us substitute a copy for that one.

(The letter referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Bennett: I have no objection to marking this original and substituting a copy tomorrow. The witness has explained in substance this letter, their claim for an increase of 78 cents per ton. I would like it in the record. Does your Honor wish it read or shall it be deemed read?

The Court: You may read it into the record if you wish.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Your Honor would like it read in the record?

The Court: I have no choice in the matter: whatever you wish.

Mr. Bennett: This is a letter on the letterhead of Westvaco Chlorine Products Corporation, Newark, California, January 14, 1944.

“Pacific Portland Cement Company

417 Montgomery Street,

San Francisco, California

“Gentlemen:

“Referring to that certain agreement dated the 29th day of January, 1937, wherein Pacific Portland Cement Company, a California corporation, is party of the first part, and California Chemical Company, a Delaware Corporation, was party of the second part, and which said agreement was subsequently [76] assigned by California Chemical Company, a Delaware Corporation, to Westvaco Chlorine Products Corporation, a Delaware corporation, and which said agreement covers the sale of gypsum to Pacific Portland Cement Company, in accordance with its terms, you are hereby advised that the average cost of the production of gypsum by the undersigned, Westvaco Chlorine Products Corporation, for the twelve-month period commencing January 1, 1943, and ending December 31, 1943, was more than five (5) per cent above its average cost of production of gypsum for the preceding twelve-month period commencing on the 1st day of January, 1942, and ending on the

(Testimony of C. Bruce Flick.)

31st day of December, 1942. The actual advance in Westvaco Chlorine Products Corporation's cost of production of gypsum for the twelve-month period commencing January 1, 1943, and ending December 31, 1943, over the twelve-month period commencing January 1, 1942, and ending December 31, 1942, was seventy-eight (78) cents per ton.

"Pursuant to the terms of Paragraph 6 of the agreement hereinabove referred to, you are hereby given sixty (60) days notice in writing, that commencing on the 15 day of March, 1944, the price to be charged you and the amount to be paid by you for all gypsum delivered to your company by the undersigned, pursuant to the terms of said agreement hereinabove referred to, will be at the rate of Three and 76/100 (\$3.76) Dollars per ton, said payment to be made in the manner set out in said agreement. [77]

"You are advised that an application will be made to the Office of Price Administration for an order confirming and authorizing the above increase in price.

"You are further advised that the books of account and records of the undersigned corporation relating to its production cost of gypsum will be open to your inspection at all reasonable times.

"Yours very truly,

"WESTVACO CHLORINE  
PRODUCTS CORPORATION,

"By W. K. WALLACE,  
"Western Manager."

(Testimony of C. Bruce Flick.)

Q. Was that letter received before or after you had talked with Mr. Wallace and Mr. Cuneo down at the plant?

A. That letter, dated January 14, giving us the notice, was dated the same day that we were in fact at the plant making this examination.

Q. You had not received that letter before you went to the plant?

A. No, we had not. Wallace had told us earlier that the costs were up and to expedite things we went down and we were there on the same day, January 14. Their letter is dated January 14.

Q. Mr. Flick, you have stated that you objected to this 49 cents for indirect items, some of which you mentioned, and told them that you were willing to pay the direct or actual costs in the sum of \$.29 without verifying the matter on their books. State to the Court why it was that you objected to the [78] increase of these indirect items of 49 cents.

A. We objected to the 49 cents overhead allocations and indirect charges because in our view it was absolutely incorrect accounting for them to charge as costs of producing this byproduct gypsum any of these overhead and indirect items. We have a product which is a waste product, and in order to give it value they have to dry it and grind it and put it on freight cars. As that gypsum is actually something they have to get rid of in order to make magnesium oxide, the sulphate is an impurity. They can't have sulphates and cal-

(Testimony of C. Bruce Flick.)

cium going into the manegisum oxide, at least not very much of it.

Mr. Rosenberg: Just a moment. Is this witness testifying as an expert?

Mr. Bennett: Well, I will consider him as an expert. He is stating his reasons.

Mr. Rosenberg: I am not going to consider him a chemical expert unless he qualifies as such. I think it is presumptuous for this accountant to testify as a chemist, and I ask that he be qualified if he is going to express such opinions.

Mr. Bennett: I would like at this time—I can do that, too, perhaps——

Mr. Rosenberg: Go ahead.

Mr. Bennett: I would like at this time to clear up one matter, Your Honor. During the opening statement of defendant's counsel, he stated among other things that this contract that [79] they lived with, acted under, and wanted to act under, at least we did, and they did on their own terms, for a period of some ten years, was invalid. He also says that this is not a byproduct. As a matter of fact, the contract defines it. The contract says:

“California contemplates the erection of a plant located on Canal Head at Newark, California, primarily designed to produce magnesium oxide in its various forms, which plant will produce as a byproduct substantial quantities of gypsum.” I think the witness need not qualify as a chemical expert to say that this is a byproduct because the parties in their contract have said it was a byproduct.



(Testimony of C. Bruce Flick.)

Mr. Rosenberg: I will stand on my objection that when the witness gets into a discussion of chemistry and what can or cannot be done in the chemical process involved in a chemical plant, he has not been qualified.

The Court: That testimony in relation to the language of that question may go out.

Mr. Bennett: Your Honor, I would like to ask this question at this juncture:

Q. So we can avoid possible objections, did you ever visit the plant down there at Newark, Mr. Flick?

A. Yes, I visited the plant in January, 1944.

Q. Were you shown over the plant and explained the details of its operation? [80]

A. Yes, I was shown over the plant by Mr. W. K. Wallace, their western manager.

Q. At that time did Mr. Wallace explain to you and tell you what the manufacturing cost——

Mr. Rosenberg: Don't be leading. I do not like to object all the time, but——

Mr. Bennett: You are right. I will withdraw the question.

Q. State what Mr. Wallace said to you, if anything, in connection with the operation, the process and operation then being carried on at the Newark plant of the Westvaco Corporation.

A. Well, we went out and looked over the plant itself. We looked at the different pieces of equipment. We looked at the tanks where the gypsum was precipitated and the unit where the gypsum

(Testimony of C. Bruce Flick.)

was dried and ground. We looked at the bins where it was stored. We looked at the loading facilities. We walked over the plant, and he just generally explained what went on in the different units, the different machines, and so forth. We had with us Mr. Wallace Riddell, who was our chemical engineer, and when we got back from the trip, I said, "Wallace, I would like to have a memorandum of the process and the equipment, and you are better qualified than I. I wish you would write it up," which he did, and I have a copy of it in my cost file, because you can't decide what is good accounting unless you understand what happened. Accounting is supposed [81] to record facts.

Mr. Rosenberg: Is that his qualification, Mr. Bennett, as a chemical expert?

Mr. Bennett: I am not contending he was a chemical expert. He was not professing to be a chemical expert, as I understood it. He may have said something about chemistry but the Court has stricken that out.

The Witness: I have to have an understanding of the processes in general in order to determine as to the accounting, and Mr. Riddell gave me that understanding. Mr. Wallace gave it to me in general terms. I have read magazine articles on it. I have read an article by Dr. Seaton. I think he said it was a byproduct in his magazine article.

Q. (By the Court): You would not care to qualify as a chemical expert, would you?

A. No, sir. [82]

(Testimony of C. Bruce Flick.)

Q. (Mr. Bennett): You spoke of an article by Dr. Seaton that you had read concerning this operation down there. Will you point out the article and describe in what publication it appeared, Mr. Flick?

A. Dr. Seaton wrote an article on a process in "Chemical and Metallurgical Engineering," November, 1931, and in this article he described in general the process, and he says, "The by-product gypsum from the process, through the operation of favorable location factors is marketable at a profit instead of being a valueless waste."

Q. Who is Dr. Seaton?

A. Dr. Seaton is the executive vice president of Westvaco Chlorine Products Corporation.

Q. And he was formerly connected with the predecessor in interest, the California Chemical Company?

A. He was with California Chemical Corporation at the time he wrote this article entitled, "Bromine and Magnesium Compounds Drawn From Western Bays and Hills," containing a flow sheet and a diagram of their then operation at Newark, which was essentially the same as the subsequent and present operation.

Q. Except as to size?

A. Except as to size. The basic chemistry is in articles, text-books and one thing and another.

Mr. Bennett: Is there any question, Counsel, that Dr. Seaton, the executive vice president of the

(Testimony of C. Bruce Flick.)

Westvaco Chemical Company, wrote this article the witness has referred to?

Mr. Rosenberg: I do not doubt it for one moment.

Mr. Bennett: I would like to offer that article in evidence at this time, your Honor. I will offer it in evidence in the form of a photostat that we have prepared from the publication, itself. I will give counsel a copy of that.

The Court: Indicate so the record is clear the purpose of this offer. It is offered to prove what?

Mr. Bennett: It is to prove, your Honor, several things: The character of operation, the method of manufacturing gypsum, the steps advised and the admission by a present officer of the corporation that gypsum is a by-product and unless processed by grinding, drying and shipping it is a waste product.

Mr. Rosenberg: We do not question that, your Honor.

The Court: That is just what I was going to suggest. There does not seem to be any question about it being a by-product.

Mr. Bennett: Counsel stated he did not accept that in his opening statement.

Mr. Rosenberg: I said nothing of the kind. I said it may be a by-product from a chemical production standpoint, but for accounting purposes it does not make a particle of difference whether it is considered a by-product or a joint product. I am sure that was my statement.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Another reason, your Honor, there is an issue [84] here as to sulphuric acid, counsel made to you. Dr. Seaton, the head technical man of this defendant corporation, states here that this sulphuric acid is necessary for the manufacture of the principal product, magnesium oxide, that they now seek to charge entirely to this by-product. I think it is important in the sense that it is an admission by the senior executive of this defendant corporation that this charge that they have sought to make for sulphuric acid against this by-product gypsum is improper.

The Court: This is off the record.

(Discussion off the record.)

Mr. Bennett: Your Honor did not rule on the matter of this article?

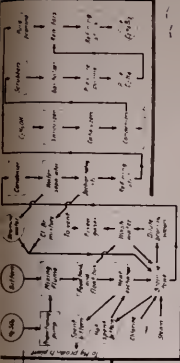
The Court: No. There hasn't been any objection made so it will be admitted and marked.

(The magazine article referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)



Right: Flow Sheet of Bromine-Dibromide Production in the Plants of the California Chemical Corp.

Below: From Crystallizing Ponds  
Such as This, Used by the Arden Salt  
Co. for Solar Salt Production, the  
Mother Liquor or Sea Water Bittern  
is Drawn for the Extraction of Bro-  
mine and Magnesium Chloride



# Bromine and Magnesium Western Bays and

On to the healthy youngsters in the growing chemical industry of the Pacific Coast is the California Chemical Co., a member of the Sierra Pacific group. This organization is particularly notable in generating its own background in being built entirely on a background of raw materials peculiar to the West Coast. Thus, although a controlling interest in this company is held by United Chemicals, it is in no sense a branch of an eastern operation; its materials, processes and products, taken as a whole, are with but a few exceptions not duplicated east of the Rockies.

In examining the established and expanding of a closely related group of industries the connection between cause and effect is sometimes difficult to trace. In this case, it may not be immediately apparent why the low quality of plastic calced magnesite from foreign sources after the War should logically have resulted in the genesis of the second largest bromine producer in this country by 1920, poor magnesite quality forced the best-consuming of this commodity to turn to the United States to 1) improve its quality and 2) to locate its source in California with the resulting large corporation of the Sierra Magnesite Co. In 1925 demand for an accessory raw material (magnesium-chloride) became as acute in the West as it was rampant in the East. This led to the establishment of another virginian—the California Chemical Corp.—to supply this product. This latter concern has gradually expanded its operations to include the bromine and other values from sea water. As a result, in basic raw material. As a result, its activities have surpassed those of

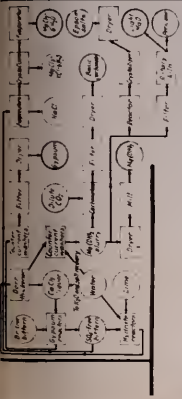
parent and of its sister industry, and accordingly, will be first discussed, and in greater detail.

Practically all of the common salt consumed on or shipped from the Pacific Coast is produced by the solar evaporation of sea water. A solar salt operation requires for its success the combination of availability of a large acreage of land of moderate value, a constant in the ocean or an ocean bay, and an essentially constant high level of a climate with high rates of evaporation and low rainfall, almost zero permeability, and a location reasonably adjacent to principal markets. The required happy combination

is found in only two localities in the west, both in California, and hence salt production is primarily centered on the southeast border of San Francisco Bay, with a smaller operation near the southern tip of San Diego Bay and one on the west shore of San Francisco Bay. Solar salt production, formerly attempted by a host of small operators, has now chiefly passed into the hands

of these concerns, which supply Pacific Coast and export markets with all of the commercial grades of salt, to years past, although remedial efforts had been made to recover values that had been lost from these operations, the sea water bittern in which such values are concentrated had normally been thrown away. It is this sea water bittern on which the processes of the California Chemical Corp. are based in supplying being obtained through long term contracts from the three principal bittern salt producers. The view at the left above shows crystallizing ponds operated by one of these producers.

In solar salt production, sea water, introduced through tide gates into immense shallow earthen ponds is gradually brought to saturation with salt through long exposure to the weather. As concentration proceeds, the brine is forwarded from pond to pond, finally being pumped to earth-bottomed "crystallizers" in which further evaporation takes place. The greater part of the salt deposits the greater part of the salt as coarse crystals. When crystallization



# Compounds Drawn From

By MAX Y. SEATON  
California Chemical Corp.,  
Venatch, Calif.

has proceeded to the point where the gravity of the mother liquor reaches 25 to 31 deg. tie—the exact value depending on the operating practice of the salt producer. The liquor is then on, washing in place, is removed wholly or partly by hand from the pool bottom. Then it is sent to the further washing, drying, straining, and refining processes which fit it for the market. It is this once-waste mother liquor, or sea water litters, which now serves as raw material for another industry. Depending on individual operating conditions and on litters strength, the bit-tern yield per ton on salt produced varies from 200 to 400 gal. Analyses of typical litters are shown in the table below on the following page.

Although the California Chemical Corp. has unit plants located at Del Rio, Vista, on San Diego Bay, and at San Mateo, on the west shore of San Francisco Bay, its major activities are centered at Newark, in the heart of the salt production area of the east shore

of San Francisco Bay. This locality has much more to recommend it than mere availability of a raw material. It has main-line transportation facilities, and, shortly, deep water dockage will permit shipping at its very door. A mild climate, making plant heating essentially unnecessary, permits the use of economical building and avoids the need for protecting the plant from freezing. Thanks to Horace Greeley, labor of unusual intelligence is abundantly available even in normal times. Excellent fresh water occurs in shallow gravels, while unlimited salt water is available for cooling. The plant is only a short distance from the principal natural-gas line entering San Francisco, and as a result natural gas, costing even less than the cheap fuel oil available in the West, is used as a primary fuel. A high-voltage transmission line runs through the plant property. Besides bidders of lime, the pure and cheap source of lime is available as raw material. These features give some indication of the sound



economic background which the operation possesses.

Bittern from the several salt producers is delivered from their crystallizers into bittern ponds at five different locations near Newark, all within a radius of some 5 miles (San Mateo and Chula Vista have a single delivery point each, immediately adjacent to the litters processing plant). These delivery ponds have only a limited capacity. They do serve, however, for retention of fresh litters over a reasonable period, during which time solar evaporation further concentrates any low-gravity materials to the higher end of the two concentrations shown in the table below. During this retention or "maturation" an important loss of sodium is experienced from the delivery ponds by the winter rains. If recovery of common salt from bittern is desired, retention of litters in delivery ponds is avoided.

Delivery ponds are connected to the Newark plant by pipe lines, litters being forwarded by numerous centrifugal pumps, so equipped that they are automatically and periodically washed with fresh water to remove salt incrustations. Bittern is delivered into some 50 acres of primary and 30 acres of secondary storage ponds. These ponds are prepared by throwing up an earth dike on impervious clay land, the dike itself having a clay core keyed into the impervious strata. Large storage facilities are the salt producers' design, and must be stored through months, and must be stored through ponds and spring. The primary storage ponds have an effective capacity, when filled to a 6-ft. depth, of approximately

Left: Line Sheet of Highway Bridge, Newark, California, as installed by the California Chemical Corp.  
Below: This Line Plant at the Newark, California, is a major salt producer. It is a member of the California Chemical Corp., a subsidiary of the General Electric Company.  
Center: General View of Newark and Membrane Products Plant at Newark, Calif.

	Biomine			
	Per Cent	Days to Run	Per Cent	Days to Run
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22
Pyrite	12.8	22	12.8	22

1135,000,000 gal. Surprisingly little rain water by winter rains is observed. Rain water floats on top of the heavy bottom and evaporates off during fair weather without having appreciably mixed with the underlying liquor.

Recovery of bromine from bottom is carried on at three plants of the California Chemical Corp. The process is a modification of the Kubiakovsky system, largely used in Germany, but altered to fit the particular raw material used and to employ typically American equipment. A flow sheet of the process is included at the Newark plant which shows the steps involved in the preparation of ethylene dibromide, appears on the second page preceding. It can be briefly described as follows: Raw bottom has a slight and variable alkalinity, which makes its further processing difficult. Accordingly, from the storage ponds it is pumped to a large square tank, from which it passes as a controlled stream into which the necessary quantity of caustic soda is added to give a proportioning neutralizing liquor, based on proportioning neutralizing liquor which flows to concrete reservoirs which hold several days' plant supply. From these reservoirs the neutralized bottom is pumped to an elevated supply tank. It next flows, by way of a constant-level float box which insures absolute regularity of feed, to the bromine separation towers, being warmed in transit by passage through a heat exchanger, counter-current to the tower liquor.

The bromine towers are square hollow towers, built of granite or soapstone plates, and filled with a ceramic packing designed to give intimate contact between gas and liquor. When in operation, chlorine gas at the bottom, chlorine gas at an intermediate point. When the proportions of these three materials are in proper balance a hot, practically bromine-free liquor escapes at the bottom, while bromine vapor, plus a little chlorine and some water vapor, is expelled through an opening near the top of the tower. This vapor mixture goes to a steamware condenser, the condensed water is separated by gravity from the crude liquid bromine, and this latter has its chlorine content removed and returned to the tower system by distillation in a purified feed. Bromine is further purified from traces of organic matter in a continuous distillation system, and is then ready for marketing as purified bromine or for conversion into bromine compounds. All bromine containing

vapors and liquids appearing at any stage of the process are returned to the main bromine towers. Final fixed gases escaping from the tower are washed free from bromine by cold water in a small steamware wash tower. Three bromine towers, each capable of taking a feed of 2,000 gal. of bottom hourly, are installed at Newark, with a single tower each at Chula Vista and San Mateo. Bromine recoveries of 95 per cent or better are regularly realized.

All three plants are equipped to manufacture ethylene dibromide from the pure liquid bromine which is the initial product. To this end, pure ethylene gas is prepared by dehydrating alcohol by passage over a suitable catalyst, the water being carried off chemically and the gas being purified by chemical scrubbing to a product of extreme high purity. Ethylene is then contacted with pure bromine at low pressure in a glass-and-steamware system, reaction between the two components being ready and complete. The ethylene dibromide resulting requires further treatment for removal of reaction by-products, and is then ready for marketing, being shipped in steel drums or tank cars. The Newark plant is being equipped to manufacture the usual organic bromides.

Exit liquor from the bromine recovery towers is essentially the same composition as the raw bottom with the exception that it is small bromine content has been replaced with ethylene. Some 3 per cent dilution by condensed steam also has occurred. Both Newark and Chula Vista plants process this liquor for magnesium chloride recovery. The step involves the concentration of the bottom in multiple effect, sub-type vacuum evaporators. Solution of the evaporated liquor (in both coolers at Chula Vista; continuous coolers at Newark) gives an essentially pure, saturated solution of magnesium chloride, which is separated from magnesium sulphate, potash, and residual sodium salts by settling and centrifuging. The magnesium chloride solution is further evaporated in open pans until it has the composition  $MgCl_2 \cdot 6H_2O$ , and this hot liquid is chilled to give solid, flake or powdered commercial magnesium chloride.

#### Other Salts Now Recovered

The present magnesium chloride market which can logically be served but a fraction of the total magnesium values present in the bottom now being received, present quantity is regularly increasing as full consumption of the West Coast alkali grows. Consequently, after extensive geological investigation and some two years' pilot operation, a small plant for recovery of these values in other forms is now in production and a large plant is being

engineered. Likewise, the method employed is that of conversion of soluble magnesium values to magnesium hydroxide through reaction with lime, and further processing of this magnesium hydroxide. This scheme can claim no novelty in conception, as it has been repeatedly suggested for the treatment of Stauffert residues and for Michigan and Ohio River brines. Particularly favorable raw material costs, recent development of markets for certain products, and some substantial advances in operating technique make such treatment feasible as a major addition to a complete discussion of the various steps of the process is lacking, but its essentials are shown in the right-hand flow sheet on the preceding page.

Unfortunately, aside from the general economic features of cheap raw and operating materials and favorable location, the magnesium-value recovery process rests on the developed ability to prepare a high-purity magnesium hydroxide which settles readily and can be filtered readily. Settling rates of several feet per hour, filter cakes on a rotary vacuum filter 2 in. thick, and filter-cake water content only slightly over 50 per cent represent values believed to be unique in the handling of magnesium hydroxide, ordinarily considered as a slimy, slow-settling precipitate filterable only on a leaf filter, if at all. Development of the desired properties has been in part due to an elaborate study of process conditions, but in even greater measure to the recognition of the fact that the properties of the product are dependent to a considerable extent on certain characteristics of the lime employed, and on the finding of methods for obtaining these characteristics.

No detailed review of the products shown on the last-mentioned flow sheet is possible at this time. Magnesium basic carbonate is a well-known product, with established markets, some of which, however, are still susceptible to a considerable expansion. Magnesium sulphate, from hydrolysis of a magnesium chloride solution, is a commercial product, and because of its excessive fineness, high purity, and low cost, finds a field which neither of the former products has been able to reach. Technical powdered magnesium hydroxide, also a product not previously available, has been found of interest as a neutralizing medium because of its high reactivity and formation of soluble reaction products. It is substantially less costly than caustic soda and lacks the disadvantages of lime. The by-product calcium sulphate, from the process, is a valuable fertilizer. The magnesium hydroxide is a product of being a valueless waste. These highlights must serve as comments on the magnesia division prod-

uets, as there remains much ground to be covered. Before discussing the next operation, however, it should be mentioned that no large-scale recovery of either the salt or the potash content of the brine has yet been undertaken. Although the potash tonnage in the brine processed is not large, it is nevertheless a substantial item. Pilot operations have indicated the feasibility of its recovery from the waste of the refinery and it is expected that, in conjunction with the operation of this plant, will be the start of a large-scale recovery of the potash. It is also obvious that the sodium chloride tonnage possible of cheap recovery is very large.

### Special Lime Is Required

The vital necessity of cheap lime of special characteristics for the magnesite products plant has been pointed out above. Years ago San Francisco Bay abounded in beds of small Pacific Coast oysters, and although five oysters have largely vanished from the bay, their shells, in the form of immense beds of oyster shell, remain. For years much of the Portland cement made in the San Francisco district has used this oyster shell as a lime source. By the application of suitable dredging and washing methods, oyster shell can be obtained as an almost pure calcium carbonate, containing only less than 1 per cent of magnesium carbonate, under 0.1 per cent silica, and traces of iron, aluminum, and manganese oxides.

Work on the processing of oyster shell to a chemical lime of unique character was started some three years ago, and culminated in 1930 with the construction of a commercial lime plant with a capacity of about 12,000 tons yearly. Shell dredged from suitable banks in the lower bay is thoroughly and repeatedly washed on the dredge, barged to plant, and burned in a rotary kiln, which is followed by rotary cooler storage bins, continuous hydrator, mill, etc. Lime plants are an old story to the chemical industry, and no elaborate description of this one will be attempted. In one respect, however, it is unique. In spite of the fact that it is regularly producing lime for normal markets, it is pointed primarily toward the preparation of a material of unusual properties for the magnesite products plant. A finding of many years' standing in the operations of the Sierra Magnesite Co., namely, that the reaction properties of its commercial magnesium oxides were dependent on degree of molecular aggregation, which in turn is a function of processing time-temperature—proved to be transferable in solution of the problem of lime-quality control. (Numerous patent applications in this field are pending.) To develop the desired character, required the application of temperatures as high as 1,600 deg. C. No normal or even high-alumina firebrick will

withstand such a temperature under the conditions which exist in a rotary lime kiln. Fortunately, the art of manufacture of refractory brick from relatively pure crystalline magnesium oxide (artificial periclase), which for several years an associated organization has produced, had advanced to the point of allowing the use of a periclase refractory to be considered. In a periclase lined rotary kiln, any general assignable construction of brick, even without the slightest lining attack, Oyster-shell lime burned at these abnormally high temperatures, is not only uniquely valuable for the magnesite products plant but is a chemical lime which is exceptionally pure and possesses an settling rate. It is accordingly being offered to Pacific Coast markets both as quick and as hydrated lime. Incidentally, it should be mentioned here that for the attainment of these high temperatures in a rotary kiln, natural gas has proved a dismal failure.

Operations of the Sierra Magnesite Co., Ltd., must be paced in rather hasty review. All of the active magnesite producers of the United States are found on the Pacific Coast. All of the caustic calcined magnesite made in this country is produced in California. Two operators have long dominated this latter field, one of which is the Sierra Magnesite Co. In the heyday of the oxyacetylene industry, a far greater tonnage of calcined magnesite was consumed than at present.

With the shrinkage of oxyacetylene plants, although consuming fields have been sought. The most important of these is found in the use of artificial periclase as a refractory. Although periclase has long been recognized as a constituent of normal dead-burned magnesite, it was believed that the production of a high-purity product, because of absence of fluxes, involved temperatures beyond the range of a fuel-fired furnace. A moderate quantity of periclase was made by electrolytic purification, but costs were so high that the use of the material was limited.

Some five years ago, through a combination of personal vision, technical know-how, and a rotary kiln, and more as applied to a rotary lining, a use of a periclase refractory lining, and a high-purity artificial periclase was first produced in the Ivterville (Calif.) plant of the Sierra Magnesite Co. In the intervening period both plant and refractory production practice has been improved to the point where high-purity periclase is now available at low cost. The refractories produced from this material, which have properties of high load resistance and freedom from swelling formerly believed impossible, attainment in a magnesite plant of periclase refractory lining offers prices equivalent to those demanded for normal magnesite brick.

Development of this product has necessitated an expansion of manufacturing facilities on the part of the Sierra Magnesite Co. Its Ivterville plant and mines were judged inadequate to cope with the growing demand for material of extremely high purity. Two important work on a new magnesite property near Gustine, Calif., had been under way for some time, and with the defining of a large tonnage of extremely high purity ore there, construction of a fully modern manufacturing plant was undertaken in the summer of 1931, operation being scheduled for late fall. This plant, located at the Ibad Eagle Mine, is approximately 16 miles from the western boundary hills of the upper San Joaquin Valley. Magnesite (natural magnesium carbonate) occurs as a blanket 4 to 12 ft. thick in decomposed serpentine. Aside from approximately 2 per cent calcium carbonate, impurities are confined to very small quantities of the oxides of silicon, iron, and aluminum. Some waste material high in impurities is unavoidably introduced in mining, but, fortunately, these impurities suffer radically in hardness from the air proper. Accordingly, mine-run ore is crushed, screened on multiple deck screens, over-size migrate toward the fines. Calcining of properly blended material is accomplished in a 100-ft.-d. rotary kiln, lined with special pebble *re-fractories*, and fired with oil. High caustic-calcined and dead-burned magnesite, as well as artificial periclase, will be made in the Ibad Eagle plant. Products will be transported by truck, Southern and transiting plant on the Southern Pacific R.R. at Ingonson, Calif. Capacity of the new operation is to be 12,000 tons annually, with definite provisions for doubling or trebling output. After it is functioning smoothly, operation of the Ivterville plant will be discontinued.

### Magnesia Sources Interchangeable

It is of interest to note that the magnesite products plant at Newark, using calcium and lime as raw materials, can and has duplicated the production of the Ivterville and Ibad Eagle operations, which use magnesite as raw material. Conversely, magnesite may, in selected cases, serve as raw material for products normally produced at Newark from lime and bittern. The advantages of this interchangeability, in following changing raw material and market situations, is obvious. It makes further apparent the logic behind the consolidation of two industries which on the surface are but little connected but which it may appear are uniquely interrelated. Why, then, are the Ivterville and Newark plants, under typically western conditions, these operations add color to the rapidly developing chemical picture on the Coast.





The Court: We will take an adjournment in this case until Wednesday, December 10, 1947.

(An adjournment was thereupon taken until Wednesday, December 10, 1947, at 10:00 o'clock a.m.) [85]

Wednesday, December 10, 1947, 10:00 o'clock a.m.

The Clerk: Pacific Portland Cement Company v. Westvaco.

Mr. Bennett: Ready for the plaintiff.

Mr. Rosenberg: Ready.

The Court: You may proceed, gentlemen.

Mr. Bennett: Your Honor, as so frequently happens, minor typographic errors appear in the transcript. Yesterday Mr. Rosenberg kindly called to my attention certain corrections that he wished to suggest in the transcript with reference to his opening statement, all of which I agreed to, and we read over the remaining portion and likewise found minor corrections. I thought perhaps in a case of this type, involving as it does technical phraseology, that perhaps it would be of aid to the Court and counsel if we could make our corrections as we go along. I have here both the list of the corrections suggested by Mr. Rosenberg and those of mine that I wish to suggest. I have not handed Mr. Rosenberg the corrections that I wish to make. They are all of minor nature, spelling of words and so on.

The Court: I do not think there will be any difficulty about any corrections that either side wishes to make to the transcript, and if you can

not have an accord there, I will try to help you.

Mr. Bennett: As to Your Honor's copy, shall I hand the [86] corrections to Mr. Welsh?

The Court: Very well.

Mr. Bennett: One other preliminary matter: Mr. Rosenberg, I understood you to say when we last convened, either in your opening statement or later on, the defendant corporation had not made nor does it claim the right to make charges for direct costs or direct processing costs up to the point that the separation of the calcium sulphate or gypsum from bittern is made.

Mr. Rosenberg: With the exception of the bittern charge, it is not in controversy, as I understand it. There has been no price increase based upon increase of cost of bittern. As a matter of fact, in the last price increase there was in fact a decrease in bittern cost, but with that exception, that is true.

Mr. Bennett: The statement I have made is true with the exception that you have claimed the right to charge a portion of the cost of the manufacture of gypsum, the initial cost of the bittern so used?

Mr. Rosenberg: A portion of it, yes.

Mr. Bennett: But as to all other processing costs, up to the point of separation of the calcium sulphate, you have not made or allocated against gypsum any of the costs?

Mr. Rosenberg: That is true. So that there won't be any misunderstanding, we do allocate to gypsum a portion of our [87] general overhead and indirect cost, but the allocation is made on the basis of our

labor cost in connection with the processing of gypsum after the point where the gypsum is separated.

The Court: No overhead prior to that period.

Mr. Rosenberg: No, Your Honor. In other words, we use as a basis for allocating of overhead the labor charges in the gypsum plant as related to the entire labor charges in the entire plant, so that in effect the result is we do allocate overhead on the basis of the relation that those labor charges bear to the entire labor charges in the plant.

The Court: So I may follow you, so there is no question about it, the overhead charges that you have in mind begin when? At what period? Through the whole period?

Mr. Rosenberg: I think I can explain it this way, Your Honor: When you are operating a plant, you have overhead charges continuously.

The Court: I understand.

Mr. Rosenberg: In order to determine what proportion of those general overhead charges are properly allocable to gypsum, we allocate them on the basis which the labor charges which are directly related to the gypsum processes bear to the entire labor charges in the plant. So our position is that results in allocating to gypsum a portion of the overhead. It is equivalent to allocating overhead after the point of separation. [88]

The Court: Does any charge begin before that time in relation to overhead?

Mr. Rosenberg: For instance, Your Honor, let us take the western manager of the company. He is

there all the time and his duties relate to everything that goes on in the plant.

The Court: All right. Then there is no charge at the very inception of this process?

Mr. Rosenberg: Not as such.

The Court: It would be well to clear that up, and I think you had better take some time so there will be no question about it. I had better take a recess so you won't hurriedly get on this record without having a full understanding of the charges, whatever they may be. I say that advisedly.

Mr. Rosenberg: Let me say this, and if this does not clear it up for the Court, then I will try to clear it up further: At the end of the month we know that during that month we have had various general expenses which can not be attributed directly to any product, such as the manager's salary, supervisory employees, accounting expense, and things of that character, so then at the end of the month we allocate those general expenses to the various products that we produce in the proportions that the direct charges of labor, directly attributable to those various products, bear to the entire labor charges. Does that make it clear to the Court?

The Court: It is clear to me, either one way or the other, [89] but I wanted to clear up in my own mind, and the reason I indicated was, the truth of the matter is from the standpoint of overhead charges attributable to this magnesium begins at the very inception of the operation.

Mr. Rosenberg: You mean gypsum, Your Honor?

The Court: Or gypsum, rather.

Mr. Rosenberg: I do not think that—

The Court: There is overhead, keeping in mind superintendents, supervision and what not, labor costs—there is a percentage that is attributable to that, isn't there?

Mr. Rosenberg: A percentage, but the percentage is based upon the labor charges that occur from this point on.

The Court: No overhead charges begin until that point in relation to this product?

Mr. Rosenberg: I think we can say that on the basis—

The Court: It would be well to clear that up. That is the only reason I developed this thing so there would be no misunderstanding. For after all, according to your statement, there is an overhead charge at all times.

Mr. Rosenberg: There is of necessity, yes, and then to determine—

The Court: And then you say it begins at this point in the process. We are talking about two different things.

Mr. Rosenberg: Let us say this, that none of the charges that are directly attributable to this process here or the one [90] that precedes it, direct charges, are charged to gypsum. The only direct charges that are made to gypsum are the charges for labor and materials that occur from the time that that material is separated at this point.

The Court: All right. There is an indirect charge, then, according to your own statement. Overhead still remains.



Mr. Rosenberg: Oh, yes, we have to have a plant there to manufacture this stuff. We could not do it out in a lot. So in order not to burden this product with more than its just share of the overhead, we allocate to this product only that proportion of the general overhead that the direct labor charges performed in the processing and the refining of this product bears to the total labor charges in the entire plant, and we think that that results in giving to this product only the proportion of the overhead that is fairly attributable to it.

The Court: I shall ask Mr. Bennett to get on record and see what his understanding is.

Mr. Bennett: I have been trying to find that out, Your Honor. The day before yesterday, when counsel mentioned that, it was the first time. As I understand it, his statement now is in this operation for the manufacture of the principal product, the magnesium oxide over here, and then the manufacturer of this by-product, namely, the drying, grinding and delivery of the calcium sulphate, which is precipitated off from the [91] bittern, so that impurities may be removed from the magnesium sulphate, the pumping in, the acquiring of the bittern, the handling of that fluid through the process of mixing in the sulphuric acid and the mixing of the calcium chloride and the other steps up to the point of separating off from the fluid this calcium sulphate, which is the gypsum factor, no direct charges are made except counsel states that they have allocated against the gypsum a portion (what portion

we do not know) a portion of the cost to the defendant of the bittern water that they purchased from the salt companies. But all direct charges or actual charges, as he says, in the handling of that bittern and the operation of the plant up to the time of the separation is not included. They started their cost structure or accounting at the time of the separation and then they charged as actual or direct cost of the production of calcium sulphate the cost of drying, grinding and delivering, that is, labor with incidental workmen's social security, the cost of materials, heat, power and water that is used in this further process of drying, grinding and delivering the calcium sulphate, which Dr. Seaton says would otherwise be a waste product, and those are the costs, Your Honor, that we say under the contract are the costs upon which actual increases may be added to the contract price, but the defendant contends that in addition to these direct or actual costs of producing the gypsum, this calcium sulphate by drying, grinding and delivering it to the [92] plaintiff corporation, they are entitled to add, and they say that they have figured on their books by a process of accounting and allocation a certain proportion of the total overhead and indirect charges of the operation of the whole plant, and as the evidence shows also some of the overhead of the New York office. We dispute and will offer evidence by experts that it is not proper in this situation to consider this overhead and indirect items a part of the cost of manufacture under this particular contract. It might be for purposes of the

accounting of the business itself, because the business can set up any sort of system—it can allocate 10 per cent, 20 per cent or nothing to a by-product—but so far as this contract is concerned, in the light of the manifest intention as shown on the fact of it and the actual intention and construction by the parties, the overhead items and the indirect items should not be included in any basis of computing any actual increases in the cost of producing the gypsum; but counsel has said they contend otherwise, and they have allocated a portion of their total overcharge and indirect items to the actual or direct cost of manufacturing this or producing this gypsum from the point of separation, and the proportion of those overhead and indirect items is determined by the relation of the actual or direct costs of manufacturing or producing this gypsum bears to the total or all of the overhead and indirect items of the whole plant during the whole period of the year. Now, that, as I [93] understand it, is counsel's position, is that correct?

Mr. Rosenberg: Well, substantially. You say all the direct charges. I limited that to labor, Mr. Bennett.

Mr. Bennett: And I understand, too, in allocating the overhead or this portion, so far to us unknown, to the claimed costs of manufacturing, the claimed actual increase of the cost of manufacturing or producing the gypsum, as the language in the contract reads, is based upon the overhead not only of this entire plant, but of the defendant company's West Coast operation and the New York office, is that correct?

Mr. Rosenberg: That portion which is allocable to the Newark plant. In other words, it is based upon all of the necessary overhead charges that are necessary to make this an integrated, functioning, manufacturing unit. That is it. Now, as I say, there is one thing I probably neglected to mention and that has already been mentioned, and that is the only other charge that we make to gypsum prior to the point of actual precipitation is the sulphuric acid during the time that we are not making bromine, the reason for that being the evidence will show that that sulphuric acid is necessary in order to precipitate the gypsum.

Mr. Bennett: Now, on that point—

Mr. Rosenberg: May I say one other thing, Mr. Bennett? You seem to be a little surprised at this information, but I think if you read the answers to our interrogatories you will [94] notice in the exhibits that are attached, it is clearly stated that overhead is allocated on a labor basis. Exhibit A, Exhibit B, overhead is allocated on a labor basis. Exhibit C, overhead allocated on a labor basis.

Mr. Bennett: We did not know the labor basis started at this point.

Mr. Rosenberg: Mr. Flick testified the other day that Mr. Cuneo told him we charged no labor to gypsum prior to the point of separation.

Mr. Bennett: Well, I was confused about that, Your Honor. I did not have in mind that all the direct charges. Perhaps counsel is right about the labor. But I understood him to say the day before yesterday there were no direct charges, and he has

repeated this again today, that there were no direct charges in this operation up to the point of separation of the calcium sulphate, which is gypsum in the wet form, or made against that, except a portion of the bittern, the cost of the bittern, and now all of the sulphuric acid, is that correct?

Mr. Rosenberg: That is correct.

Mr. Bennett: You also agree and will stipulate, Mr. Rosenberg, up to July 1, 1945 and from 1937 up until that time, no part of the sulphuric acid you used at your plant in this operation or any operation from which gypsum was produced as a by-product was charged against the gypsum?

Mr. Rosenberg: That is right. It was all charged to the [95] bromine.

Mr. Bennett: Yes.

The Court: I am possibly responsible for this, but I like to follow the testimony and that is the reason I had to have this explanation. Now, is it as clear to both sides—

Mr. Rosenberg: Is it clear to the Court, Your Honor?

The Court: Oh, it is. We are talking about overhead, which is a charge on everything.

Mr. Rosenberg: That is right.

The Court: And then we come in and we are charging beginning at a certain point directly to gypsum.

Mr. Bennett: I think Your Honor has been of help to me. I do not know whether counsel has had this in mind.



The Court: Well, I have not gone over your pleadings nor your interrogatories nor familiarized myself at all with the case. I like to meet any problem with an open mind.

Mr. Bennett: I think it is well that we have our positions stated now.

The Court: Is there anything else that you have in mind?

Mr. Rosenberg: In other words, I wanted to make sure that the Court understands that the overhead is allocated on the basis of the labor that is performed on the gypsum from the time that it is separated from the bittern.

The Court: May I inquire if you know—and it is because I am limited in this accounting field—what would be the overhead [97] at the very inception? A fraction or what, in relation to your gypsum?

Mr. Rosenberg: What would be—

The Court: Or any kind of charge. Maybe that is not a fair question.

Mr. Rosenberg: I do not think I am competent to answer that.

The Court: On every product there is a charge for overhead, anything produced in any factory.

Mr. Rosenberg: That is right.

The Court: All right. What is the percentage in relation to the product gypsum?

Mr. Rosenberg: Well, it varies. There is no fixed percentage.

The Court: That is the reason I am inquiring. Maybe it is not a fair enough question. I am not close enough to your problem.

Mr. Rosenberg: In the year 1942, out of total charges of \$1.93 per ton, overhead was 42 cents; in the year 1943, out of total cost of \$2.71, overhead was 82 cents. In the period—

The Court: I just wanted one example. For example, the first one in 1942, it was 42 cents?

Mr. Rosenberg: That is right.

The Court: What was that made up of?

Mr. Rosenberg: Here are the subsidiary accounts which [97] make up that total: Research, research new products, plant accounting, purchasing and stores, engineering, Newark supervision, Newark general plant expense, Newark shop and maintenance, Newark laboratory, Newark plant protection, Newark process control, West Coast general expense, West Coast general supervision, West Coast telephone and telegraph, West Coast New York office—that means a portion of the New York office expense that is allocated to this plant—West Coast exploration, West Coast subscriptions and donations, West Coast cost control—

The Court: Let us take any one of those items. Have you the figures available there?

Mr. Rosenberg: Yes, Your Honor.

The Court: Telephone, for example, so I may follow it through.

Mr. Rosenberg: Well, telephone and telegraph in the period from July 1, 1944 to June 30, 1945—that is a period of twelve months—there was a total of \$711.57 allocated to gypsum for the year.

The Court: That would be a percentage of what?

Mr. Rosenberg: That would be a percentage of the total.

The Court: Limited to this plant here?

Mr. Rosenberg: Yes.

Mr. Bennett: The whole West Coast operation part of the New York expense, too, I understand.

Mr. Rosenberg: I do not know. That is something we will have to get from the accountant. Mr. Ray may know that.

The Court: That is why I got into this discussion. However, both sides will be comforted with the record here. Let us proceed.

Mr. Bennett: Your Honor asked one question with respect to one specific example. I thought that this might be illuminating: Using their own figures from July 1, 1945 to June 30, 1946, their direct charges, that is, the charges for labor, labor repairs on machines in the manufacture of gypsum, workmen's compensation insurance, social security taxes, materials and supplies, operations, materials and supplies, repairs, water, power, gas, fuel oil, which was a direct or actual cost of producing gypsum, was asserted by the defendant to be \$1.13 per ton. The indirect or the total alleged or claimed cost of production, including the indirect and claimed overhead items, amount to, according to their figures, \$3.12. In other words, the direct or actual cost according to their figures was \$1.13. They claim \$1.99 additional overhead and indirect charges for that period.

The Court: You will have experts on both sides?

Mr. Bennett: Yes, Your Honor. Mr. Flick, will you take the stand, please? [99]

Mr. Bennett: My colleague, Mr. Kaapcke, called my attention to a possible slip of speech. He said

I said something about charges that we don't question. I was referring to the actual or direct charges, the cost or actual cost and the actual increases in the cost of manufacture of gypsum as I have previously indicated, the cost for drying, grinding and delivering. We do question any allocation from the bittern. We do question any part of the sulphuric acid; that will be shown by the record and the evidence before Your Honor.

The Court: Very well.

Mr. Rosenberg: So the record may be clear, Mr. Bennett, you realize that there is no claim of bittern charge involved in these increases; that is true, isn't it? In other words, the last increase we gave you, our cost was reduced from 18 to 16 cents per ton and in 1942-1943 it was charged the same, both periods.

Mr. Kaapeke: I think that is correct except that on defendant's books as disclosed by the costs furnished us, it shows in the period of the first increase there was a bittern increase of 4 cents.

Mr. Rosenberg: That is not in controversy in this litigation.

Mr. Bennett: Well, in this litigation it is in controversy because we have a contract to deal with in the future. I want to get it perfectly clear to the Court so you are not [100] misled and in order to have it clear, I will state we object to the inclusion in the cost of products under the contract as intended by the contract of this by-product gypsum or any cost of bittern or any cost of sulphuric acid. The evidence will show Your Honor the reason why.

The Court: Very well.

Mr. Bennett: Mr. Flick, will you take the stand?

C. BRUCE FLICK

recalled, previously sworn.

Direct Examination (resumed)

Mr. Bennett:

Q. You testified the day before yesterday that you had been down to the plant of the defendant at Newark and were shown some figures that were represented by the defendant's representative to be taken from their books and you then returned to your office. I will ask you, Mr. Flick, whether under date of February 4, 1944, you wrote a letter to the defendant at Newark, California, copy of which letter I now hand you.

A. Yes, I wrote this letter.

Mr. Bennett: Any question about that letter, counsel?

Mr. Rosenberg: No question.

Mr. Bennett: I offer this in evidence as Plaintiff's Exhibit No. 4.

The Court: Admitted and marked. [101]

(Thereupon the letter in question was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Bennett: It is dated February 4, 1944 addressed to Westvaco Chlorine Products Company, Newark, California, att: Mr. W. K. Wallace, Western Manager.



(Testimony of C. Bruce Flick)

“Gentlemen:

“Subject: Westvaco Cost Charged to Gypsum

“We have reviewed the suggested form of letter which Mr. Wallace handed to Mr. Flick on January 31, 1944, to be addressed by Pacific Portland Cement Company to Westvaco Chlorine Products Company. We recognize the problem that exists from your point of view, and wish to cooperate fully in solving it.

“As indicated in our conversations, we question the correctness of the proposed price of \$3.76 per ton. The figures you have furnished us show a basis for claiming a certain amount of price increase, but not, as it looks to us, to the full extent of 78c per ton. We are advised that when application is made to O.P.A. for authority to increase the price, it should be on a definite and unquestioned basis, as otherwise the application might be prejudiced.

“Your figures show that the 78c increase is composed of:

“Direct costs	.29
Overhead	.40
Taxes, Insurance and	
Depreciation	.08
Water (I.D.C.)	.01
<hr/>	
Total	.78

“The overhead for 1943 includes \$2,804 on account of a portion of new products research expense. This would not seem to be an “actual advance in cost of manufacture” of gypsum. Pro-rated expense for Purchasing and Stores amounts

(Testimony of C. Bruce Flick)

to \$1,192 for 1943, compared with \$2,170 for materials and supplies. This disproportion apparently results from the method of prorating. Various other items appear to be open to question.

"It is our understanding that according to generally recognized accounting practice, by-product gypsum should be charged only with costs directly incurred to put it in marketable condition, and should not be charged pro-ratas of overhead expense which the plant would have regardless of gypsum production and which do not represent actual cost of manufacture of by-product gypsum.

"We should like to suggest that we examine in greater detail and discuss further with you all the accounting charges in question and see if we cannot agree as to their correctness under the contract, before proceeding further. We know you wish to avoid any unnecessary delay, and we shall await your call.

"Very truly yours,

"Pacific Portland Cement  
Company

/s/ "C. B. FLICK

"Controller

"CGF:EH" [103]

Q. (Mr. Bennett): Prior to writing that letter, you had received from the defendant a form of letter which was mentioned in your letter of February 4, which they had asked you to send on to them for the purpose of enabling them to make an OPA application for an increase in maximum price?

(Testimony of C. Bruce Flick)

A. Yes, I have. They had prepared a copy of a letter which they wanted Pacific Portland Cement Company to sign which would accompany their application to the Office of Price Administration for an increase in their permitted maximum price under the maximum price regulation. The price was frozen at \$2.98 where it had been in 1942 when the OPA basic period was stated.

Q. Do you have a copy or any record in your files of that letter other than the reference to it in your letter of February 4?

A. I do not have a copy of that first draft of that letter. I did find the final letter which we eventually signed to go along with that application, but I have no copy of that first proposed letter.

Mr. Bennett: I suppose, counsel, your client does have a copy of the letter sent prior to February 4?

Mr. Rosenberg: I don't believe I have, Mr. Bennett.

Mr. Bennett: It probably is not material, Your Honor. I just wanted to show why we haven't produced it.

Q. In your letter of February 4, or following your letter of [104] that date, February 4, did you receive a reply or was there any conference concerning the matter stated in that communication to them?

A. I don't believe that we received a written reply, only a day or so later, in fact, on February

(Testimony of C. Bruce Flick)

7, Mr. Wallace and Mr. Williams of Westvaco came to my office and discussed the questions raised in the letter and particularly with reference to the question raised in the letter as to the claimed increase of cost. Westvaco claimed the cost had gone up 78 cents, 29 cents therein on direct charges and the remainder of 49 cents was in all of these overhead and other allocations. So Mr. Wallace and Mr. Williams came to my office to talk about it and discuss these questions.

Q. What was said by Mr. Wallace, Mr. Williams and yourself in connection with that subject matter at that time and place?

A. Mr. Williams stated that this gypsum, we discussed the question of whether the gypsum was a byproduct. Williams said the gypsum was a co-product and not a byproduct. He said he was a little hazy on the terms of the contract but as far as he was concerned, byproduct did not mean anything, that it was a co-product, not a byproduct. I pointed out various reasons why in my opinion it was a true byproduct as recited in the contract and that being a product incidental to the production of magnesium oxide that they could dump it if they chose instead of drying it and grinding it and delivering it and the [105] contract required that we take all of it in excess of 4,000 tons a year and the contract itself said it was a byproduct and the plant was built primarily to produce magnesium oxide and the gypsum was of little expense—I mean, it was only about 5 per cent of the labor for the entire

(Testimony of C. Bruce Flick)

plant and the sale thereof on the presumption—I will skip that because I made a presumption. The value per ton of gypsum was only about one tenth of the value of ton of the magnesium. But under my reasoning as an accountant, I considered it was a true byproduct and we should apply to it only the direct charges and not all these overhead allocations.

Q. This was the discussion—

A. This was the discussion with Mr. Wallace, W. K. Wallace of Westvaco, and Mr. Williams who was at that time an assistant to the president, I believe, but he was out here from New York for the purpose. They did not deny any of my points but they said regardless of all that they considered it a co-product because that was their practice in all their plants throughout the United States, that they had a uniform accounting system but they believed their uniform accounting practice of allocating all overhead to all products should apply, and of course, I said, “Well, an accounting practice which you follow in your own company for your own purpose is entirely satisfactory to you, but not appropriate to this contract for the purpose of the escalator clause.” I even told them I had seen in the files a [106] letter that Mr. Barrows wrote to Mr. Colton in which he specifically mentioned the items—

Mr. Rosenberg: I will object to any testimony from this witness as to what he saw in somebody else's files. He is about to go into something that will be objectionable.



(Testimony of C. Bruce Flick)

Mr. Bennett: This is a discussion.

The Court: Pardon me. The objection goes to that letter that he saw in the files.

Mr. Bennett: Well, he has stated—

The Court: We are developing a conversation here.

Mr. Bennett: May it please the Court, this was a conversation had between Mr. Flick representing the plaintiff and Mr. Williams, the assistant to the president, and Mr. Wallace representing the defendant, and the subject of the conversation was the interpretation of the contract and the letter that Mr. Flick is referring to, he says when they were talking about their uniform accounting practice including overhead, he says, "I have in my files—"

The Court: In relation to what you saw in the files, was there a discussion about it?

The Witness: The letter I referred to was in this conversation. I said to Mr. Wallace, "I have even got a letter in my file that Mr. Barrows wrote to Mr. Colton in which he mentions labor, fuel and supplies."

Mr. Rosenberg: May I ask what the purpose of this [107] testimony is?

Mr. Bennett: Well, counsel, you said in your opening statement, one thing, that this contract was invalid because costs of construction were up, cost of manufacturing and actual advances in the cost of producing and manufacturing gypsum was so uncertain, ambiguous, I think you used the term, that the whole contract is invalid. Our position is,

(Testimony of C. Bruce Flick)

of course, it is not, that all this Court is required to do is what other courts are required to do, that is, interpret the contract in the light of the contract and in the light of the meaning of the parties.

The Court: Proceed. Objection overruled.

Mr. Bennett: Does Your Honor wish me to proceed or do you have another matter?

The Court: We will take a recess.

Mr. Rosenberg: Before we adjourn, I notice the witness has been referring to notes to answer the questions. Could I take a look at those notes during the recess?

Mr. Bennett: For the record, I will have the witness describe what the notes are.

The Court: Well, he just wants to look at them.

Mr. Bennett: Certainly, he can do that.

(Recess.)

The Court: You may proceed.

Q. (Mr. Bennett): Mr. Flick, did you repeat the substance [108] of the conversation you had with Mr. Williams and Mr. Wallace of the defendant corporation and yourself in your office on February 7, 1944?

A. I completed most of it. I believe I had just mentioned the fact we were discussing what ought to be included in these charges to the cost of production of the byproduct gypsum and I had just mentioned the fact I told Mr. Williams and Mr. Wallace that I had seen the letter from Mr. Barrows to Mr. Colton specifying labor, fuel and supplies. We left it that I would further review with

(Testimony of C. Bruce Flick)

Mr. Wallace what Mr. Williams called technical accounting questions. He said when they got all through with that there was still what he terms a practical situation that Westvaco must get enough for the gypsum to make it pay to produce it. I said there was no question about their right to charge all direct or actual costs but allocating overhead which was not out of pocket expense for producing gypsum—a particular illustration that stuck in my mind was the “New Products Research,” they were charging 10 cents a ton, and another illustration was the excessively high charge for purchasing stores expense. That was about all that discussion.

Q. Counsel referred, and it was obvious to the Court, that you were referring to a memorandum or a paper when you stated the conversation that took place at that time, Mr. Flick. What was the paper or memorandum that you referred to?

A. Well, this paper is a memorandum of that conversation which [109] I dictated immediately following the conversation.

Q. I hand you herewith a copy of letter from California Chemical Company, Mills Tower, 220 Bush Street, San Francisco dated June 5, 1936 addressed to Pacific Portland Cement Company, 111 Sutter Street, San Francisco, Attention: Mr. Colton, Vice President, and purports to be signed by California Chemical Company by Stanley H. Barrows, and I will ask you whether that is the letter that you referred to in your statements or discussions with Mr. Wallace and Mr. Williams on this 7th day of February, 1944, conversation.

(Testimony of C. Bruce Flick)

A. Yes, this is the letter. I think what I had in mind is on page 3 of this letter where he said—

Mr. Rosenberg: Just a minute. The letter is the best evidence of its contents, I submit.

Mr. Bennett: I offer the letter in evidence.

Mr. Rosenberg: To which I object on the ground it is incompetent, irrelevant and immaterial; the proper foundation has not been laid. This letter purports to be a copy of a letter dated June 5, 1936, which is seven months prior to the execution of this agreement. I think that before this letter comes in we are going to have to argue to the Court on the admissibility of any evidence relating to the negotiations that resulted in and were merged in this contract. Mr. Colton is now here in court. I see him sitting in the court. The letter was addressed to him. I presume counsel is going to put him on the witness [110] stand. I would suggest that rather than arguing the matter at this time that this be marked for identification and before a foundation is laid by counsel as he apparently is about to go into a matter antedating the execution of this agreement, I think that is the time to argue the admissibility of that evidence. I am prepared to argue it now. I am offering that as an expedient way to dispose of it.

Mr. Bennett: Before Your Honor even attempts to determine the matter, I would like to call Your Honor's attention to Mr. Rosenberg's own statement when he was cross examining Mr. Colton on this question of going into the details surrounding

(Testimony of C. Bruce Flick)

the execution and leading up to the execution of the contract.

Mr. Rosenberg: I will object to any reading from a deposition that is not in evidence.

Mr. Bennett: Well, I am doing it just in the court record here and it is your statement of your position as to your right and the province of the Court to go into this subject matter. I think I can quote counsel just as though you had said it at some other time.

Mr. Rosenberg: I will object to any reading from a deposition in here. I will make my position quite clear.

The Court: For the purpose of the record, you objected because the proper foundation has not been laid. In other words, what you have in mind—

Mr. Rosenberg: The letter purports to be from Mr. Barrows. [111] The foundation has not been laid as to who this Mr. Barrows is. The foundation has not been laid as to who Mr. Colton is. My main objection, however, of course, is on the ground that any negotiations that antedated the execution of this agreement are merged in the agreement and the agreement speaks for itself. If counsel is going to offer evidence as to the negotiations by correspondence between the parties leading up to the execution of this agreement, Your Honor, I want his position clearly stated for the record and I am not in a position to ask that at this time.

The Court: I am going to call the grand jury now. They are here. Be prepared to argue the ad-



missibility of it after we dispose of the grand jury.

(Recess.) [112]

Mr. Bennett: Counsel, I would like you to answer this as preliminary, and in view of the general objections you stated to clear up the point of foundation: Is it not a fact that on June 5, 1936, Stanley H. Barrows was president of the California Chemical Company, the original party seller under this contract, and was its president on the date of the execution of the contract in question?

Mr. Rosenberg: That is right.

Mr. Bennett: I will ask you to stipulate that Mr. Colton, to whom this letter of June 5 is addressed, was on the 5th of June, as well as on the date of the execution of this contract, vice president of the Pacific Portland Cement Company, the plaintiff in this action?

Mr. Rosenberg: That is right.

Mr. Bennett: With that, Your Honor, I think it is perfectly clear this letter is admissible. I need not discuss the parol evidence rule with Your Honor. That rule is that if a term used in a contract is perfectly clear and free of any ambiguity, the Courts usually do not go beyond the contract itself for an interpretation, that is, the term as used in the context in relation to the purpose and objects of the contract, as used in the particular sense and way in which it was used.

On the other hand, if there is question as to the meaning of a term, in this case in the escalator clause providing a right of the defendant to increase its price upon an actual— [113] I quote the

words of the contract—"an actual cost of production," "cost of manufacture," terms used in the contract, of this byproduct gypsum, counsel says for the defendant that it is ambiguous. He goes so far as to say that it is ambiguous, that the contract is invalid; but he says if it is not that far, at least it means all costs, every cost, indirect overhead as well as the direct costs. We have shown to Your Honor not only by my statement, but the testimony of this witness, that we have taken the view all along that these terms, cost of production and actual advance in the cost of manufacture of this byproduct gypsum, intends and should be limited to the actual or direct cost of the manufacture. That is the principal issue in this case. If there is a question of ambiguity, as counsel asserts, or if there is a question of whether these words were intended to mean and should be construed to mean all embrasive, every possible conceivable cost, or should be narrowed to the actual increase in cost of production so far as the purpose of this contract and that escalator clause is concerned, then under the undisputed rules of evidence, parol evidence, attending circumstances showing what the parties were talking about and intended, is admissible. It is an aid to the Court in interpreting that clause. It is not offered for the purpose of changing the contract, which is the basis for the invocation of the parol evidence rule.

The Court: Is the matter submitted?

Mr. Bennett: Yes, Your Honor.

Mr. Rosenberg: Yes.

The Court: I am going to allow this testimony to go in over your objection and subject to your motion to strike, so both sides will be comforted with the record.

(The document in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

PLAINTIFF'S EXHIBIT No. 5

California Chemical Company  
Mills Tower, 220 Bush St., San Francisco

June 5, 1936

Pacific Portland Cement Company  
111 Sutter Street  
San Francisco

Attention: Mr. Colton, Vice-Pres.

Dear Mr. Colton:

Following our verbal discussion, I will attempt to outline in brief form, a proposed basis of conditions that may be of interest in an inter-corporate relationship holding mutual advantage. It is, of course, to be expected that in case an understanding is reached on the major points involved, that a great many details not yet even considered will have to be disposed of in the attempt to put such agreement in contractual form.

However, following your suggestion, I will enumerate below a few of the conditions upon which we have done some preliminary work.

1. Our idea would be a contract covering a period of 30 years, covering our entire requirements of shell

roughly estimated at between 200,000 and 300,000 yards per annum.

2. One of our prime objectives contemplates the construction of a major plant located on canal head at Newark to manufacture magnesium oxide and other products by reacting calcined oyster shell and magnesium chloride. From the foregoing operation, we would produce 18,000 tons of Gypsum. The estimated equipment for calcining lime in this connection would contemplate that we would have excess calcining capacity for approximately 10,000 tons annually of calcined quicklime over and above our own estimated requirements.

3. We would propose a contract permitting us to dredge and prepare oyster shell taken from oyster shell beds own by you. We require a certain type of shell and consequently, location of dredging rights would have to be determined.

4. We propose to pay you five cents per cubic yard of shell removed from your properties. The method of determining quantities so taken to be decided upon by mutual agreement.

5. We would offer to sell you all of the Gypsum produced by said plant except 3,000 tons for which we reserve the privilege of marketing for chemical uses. This would leave an estimated 15,000 tons per year of Gypsum which we would offer you at \$2.60 per ton, loaded on cars at our plant at Newark.

6. We would also offer to sell you up to 10,000 tons of calcined lime based upon present contemplated plant capacity. We would agree to supply this

lime either in bulk quicklime or hydrated form at prices next below noted:

Bulk quicklime loaded on cars, \$6.50 per ton.

Hydrated lime in 4-Ply paper bags, \$8.50 per ton.

7. The foregoing prices are based upon present contractual costs for oyster shell for which no royalty or other purchase fee is charged. For each one cent per yard you charge us for oyster shell add to the above quotations as follows:

For Gypsum, 4c per ton.

For Quicklime, 6c per ton.

For Hydrated Lime, 5c per ton.

8. We desire the right to sell up to 3,000 tons per year of Gypsum for strictly chemical purposes, but would agree not to sell Gypsum for plaster, agricultural, building or other uses that would compete with your present outlets.

9. We desire the right to continue to sell Quick or Hydrated lime for industrial and chemical uses as at present, but would agree to forego any activities or sales to the construction and agricultural industries leaving these fields exclusively to you.

10. We desire the right to continue to sell shell for industrial uses as at present and would want to work out some mutually satisfactory deal to sell shell for poultry and agricultural use. The quantities and conditions regarding shell referred to in this paragraph to be worked out on a reasonable basis.

11. Contract would contain certain price protection clauses to guard against increases in labor, fuel and supplies, some moderate minimum payment in order to keep the contract alive in depression or competitive siege, privilege of cancellation by us on fif-



teen-month written notice, together with the many other features not intended for preliminary contemplation.

I would appreciate it very much if you can arrange to give the matter your early consideration, inasmuch as we are desirous of holding meetings early in July ostensibly for the purpose of arriving at decisions concerning construction at Newark. We, of course, will be very glad to meet with you meantime as is necessary in order to bring the main features of consideration in line, satisfactory if possible to both parties.

In case you should be interested in purchasing lime additional to the 10,000 tons per year mentioned herein, we would consider increasing capacity, contemplating cost plus amortization plus moderate profit providing that prospective volume and conditions should later justify such action.

I will await further word from you, and with kind regards, I am

Yours sincerely,

CALIFORNIA CHEMICAL COMPANY

By /s/ Stanley H. Barrows.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock P.M.) [132]

Wednesday, December 10, 1947, 2:00 o'Clock P.M.

The Court: You may proceed.

C. BRUCE FLICK,

resumed the stand, previously sworn.

Mr. Rosenberg: Your Honor, I understand the Court ruled about that letter before adjournment subject to a motion to strike.

The Court: And over your objection.

Mr. Rosenberg: I am not going to argue the objection any further. However, I do want my position made clear for the purpose of the record because in the course of his argument Mr. Bennett on several occasions stated what our contentions were. I would like it clearly understood we do not consider that there is any ambiguity on the face of this contract. Our contention, on the contrary, is that the contract contains in it what the parties intended it to contain, that the contract bespeaks the intention of the parties and there was a meeting of minds. It is our contention, however, that although the parties in that contract got into it what they intended to get into it, that is, that the price increase would be based upon cost of production, that for the purpose of this transaction that there are more and more things that were left unsaid, that if the Court would attempt to supplement the language that appears in the contract by anything of the nature contended [133] for by the plaintiff that affects cost of production, they meant only direct cost of labor, materials and fuel, that that would be a departure from the written agreement, that the evidence would have the effect of varying the terms of a written contract and the evidence is not admissible. I still want to state our position

(Testimony of C. Bruce Flick.)

and I also feel, if the Court please, that that evidence having been offered by the plaintiff I am not sure I know the purpose of the offer, and I would like Mr. Bennett to state for the record the purpose of offering that letter in evidence. I, frankly, don't know.

Mr. Bennett: Well, I thought I had stated that, counsel, several times. I stated that we have a dispute here. You contend if this contract is not invalid because of the uncertainty or ambiguity of the term actual advance and cost of manufacture, or the term cost of production of gypsum, it is embraced—well, that is not exactly it, every cost including your costs that are set up as a result of your uniform cost accounting system for your own purposes nationally, that the letter shows that that was not what Mr. Barrows, the president of the California Chemical Company, was seeking at all and it is one of the circumstances and indications that the Court can and should take into consideration, not for the purpose of adding to or subtracting from the contract one bit, but to interpret the terms used. I say this proposal shows that at the very start of the negotiations that the defendant's predecessor [134] was seeking in this escalator clause wherein these terms that are in dispute here as to their meaning occurred; in other words, in fact, states on its face that he had no purpose and there was no intent to include in the escalator clause or price protection clause by the term "cost of production" or "actual advance" or "cost of

(Testimony of C. Bruce Flick.)

production" all these overhead and all these indirect items which you now contend they mean and the intention of the parties as expressed by the contract which is in dispute but which the Court will ultimately determine.

Now, Mr. Rosenberg, there was no dispute this letter was sent by Mr. Barrows?

Mr. Rosenberg: No, no. I am trying to find out the purpose. What I would like to know, is it the contention of the plaintiff that this contract is uncertain and requires explanation or interpretation, or does the plaintiff contend that the contract is clear, that the meaning of the contract can be derived by the language therein?

Mr. Bennett: I think I have stated that several times. I don't think I should state it again. In answer to that question, all I need to say to the Court is to say it is uncertain. That is sufficient to enable us to offer this in evidence. After all, that is what this Court is going to decide. The Court is going to decide what was the meaning of this term.

The Court: Cost of manufacturing.

Mr. Bennett: We are going to show this, the escalator [135] clause wherein the "cost of manufacture" is used to permit an increase in the price to protect the party, the defendant against increases in cost, and the question is what costs. They assert everything, including their company's New York office, and so forth, indirect charges. We, on the other hand, say it was intended to meet

(Testimony of C. Bruce Flick.)

direct costs of manufacture. This letter from Mr. Barrows who proposed this clause in the first place and for whose benefit and only whose benefit it was put in the contract, declares that states that it was his purpose when the contract was drafted to have a clause in there that would protect the defendant against increases in price for these direct charges and it shows that at that time Mr. Barrows and defendant's predecessor did not have in mind nor desired a price protection clause or an escalator clause that would enable them to add to the price charged and add those increases, every conceivable kind of indirect charge or overhead charge. I think that matter has been made perfectly clear. I don't think we need argue that until this case is in position to be argued when all the evidence is in.

The Court: "California will keep books of accounts and records showing its production and cost thereof and such books of record, books and accounts relating to the production of cost of gypsum, shall be open to"—and so forth and so on.

Mr. Rosenberg: I would like to make that request once more. I am frank in telling the Court I am not clear. I am [136] trying to find out whether the plaintiff contends or does not contend that this contract is uncertain or requires explanation or interpretation by evidence dehors the contract. I think I am entitled to know what their position is. Do they claim this contract is sufficiently certain that it does not require any interpretation or any explanation from extraneous sources or do they not? That is all I want to know.



(Testimony of C. Bruce Flick.)

Mr. Bennett: Counsel,—no, he is not entitled now to ask me that question because in the first place I am not required to answer it. He stated the position as one of the litigants here that the contract is uncertain in that particular. So I am entitled to offer evidence here concerning what the intention was. I have already stated a number of times what our position is and I don't think they should state the question—I don't wish to detract from any situation here where some undisclosed purpose may be in his mind.

The Court: At any rate, it is in evidence over your objection and subject to your motion to strike. Your legal position is in the record. Whether it was vague or indefinite or what not, I am not concerned with that now. Proceed.

### Redirect Examination

(Resumed)

By Mr. Bennett:

Q. Mr. Flick, have you related to the Court the substance of the conversation of February 7, 1944, between Mr. Wallace and Mr. Williams of the defendant corporation to yourself? [137]

A. I believe I have covered that quite fully.

Q. Now, when was the next conference or conversation that you had with anyone representing the defendant corporation with reference to this same subject matter in dispute?

A. Mr. Williams and Mr. Wallace came to my office again on February 10 for further discussion. Mr. Williams said he had asked New York office

(Testimony of C. Bruce Flick.)

to discuss with their auditors Peat, Marwick and Mitchell—

Mr. Rosenberg: February 10, what year?

The Witness: 1944.

Mr. Rosenberg: Thank you.

The Witness: Asked Peat, Marwick and Mitchell, their auditors, the question whether overhead items should be allocated to a byproduct and their reply was that they considered it good accounting practice and they approved Westvaco's accounting methods. I said Price, Waterhouse & Company, our auditors, told us that good accounting practice for a byproduct would not charge it with overhead. Mr. Williams said Westvaco could not change its uniform accounting methods for one particular purpose such as this contract. I said, well, they could easily keep a few auxiliary accounts for the contract. We have had special accounts from time to time, we have kept special accounts.

Mr. Williams said no two accountants would agree on methods to be followed in allocating costs and "We have used these [138] methods right along, they ought to be continued, and in the long run we will have increases as well as decreases." I said we believed that good accountants reading the contract and knowing how the gypsum was produced, would take the same view that overhead should not be allocated to the by-product, to the cost of the by-product.

Then I discussed with them the question of the decrease in their production, their production of

(Testimony of C. Bruce Flick.)

this by-product gypsum, which was approximately 24,000 tons in 1943 and had been about 32,000 tons in 1942, it had dropped between seven and eight thousand tons in production, and that is about 23 per cent, and I said that I wished they would tell me whether it was true, as I had been given to understand, that part of the reason for that drop was because they formerly used calcium hydroxide made from oyster shells, and they changed their process and were now using dolomite, and I understood this dolomite has a percentage of magnesium, and since they are after magnesium oxide—that change from the use of the shell to the use of the dolomite would give them more of the magnesium substance that they were after, to get the magnesium oxide, and by using the dolomite they wouldn't have to use as much bittern, so they had less bittern and less of the sulphates, and consequently less of the by-product gypsum. The gypsum product had dropped from 32,000 to about 24,000 tons, because you have a smaller tonnage of gypsum by reason of that change. And that would [139] give a higher cost per ton. From 1942 to 1943 these overheads had gone up about 40 cents per ton, and we were asking them if part of the reason for that increase per ton was because the tonnage of gypsum had dropped, because they were using dolomite which had more magnesium in it, and Mr. Wallace said, Well, the change did give them more magnesium oxide, but he said it was made because the Government wanted more magne-

(Testimony of C. Bruce Flick.)

sium oxide, that the cost for the magnesium oxide was far more to Westvaco, and that they did not make the change entirely voluntarily.

Mr. Williams said Westvaco was reviewing all of their operations and shutting down any that is not profitable, any that will not show a suitable profit after bearing its proper share of the overhead. I said, "That is sound, that is all right, but where you are going to discontinue, the discontinuance ought to be based on out-of-pocket basis." In other words, what would the company make by the operation that you would not make without the operation?

Williams said Mr. Colton drove a hard bargain when the contract was negotiated. He had Mr. Barrows on a spot. Westvaco does not complain, but wants a fair and reasonable consideration so both parties may continue satisfied and friendly. I said that certainly was the way we wanted to get along, we wanted to carry out the contract and continue to be friends. I said, "I can't help but feel you have made more money on gypsum than [140] your books show under the accounting system you use." Williams said, "I think you are justified in questioning the charge for 'New product research.'" And Williams said the research was for the Newark plant, California, only, and it would result in bringing down the plant cost, and therefore ought to be included. Mr. Williams asked me to go along with them on what he called a practical commercial basis and agree to the price increase. He

(Testimony of C. Bruce Flick.)

said they had had pretty good luck with OPA, but the price was frozen, costs were going up, and they were tired of it. I told them I could not recommend the 78-cent increase to my management, recognizing fully that Westvaco's figures show increased direct costs, justifying a certain amount of price increase, but that I could not agree with their overhead charges against gypsum.

Williams said they might have to consider dumping the gypsum as waste instead of processing it for sale, if they couldn't make a reasonable profit on it, it wouldn't be worth while to carry on. He said he wouldn't suggest they ought to dump it, because he knew we wanted to continue on. Williams said he felt a further detailed examination of the accounts would be fruitless, in view of the opposite position as to the main accounting principle involved, although they would be glad to have Pacific go into all the detail desired.

Mr. Wallace said, "How about accepting the 78 cents a ton figure with an understanding that the escalator clause [141] will work downward as well as upward, and let's get the term "cost of production" defined, so that we don't have any more arguments about this thing in the future."

Q. Who said that?

A. Mr. Wallace. This is Mr. W. K. Wallace, the Western Manager.

Q. He said, "Let's get the term 'cost of production' defined"?

A. Yes, to avoid any future controversy. I said, "I still can't recommend 78 cents increase." And



(Testimony of C. Bruce Flick.)

Williams said he was going back to New York on February 14th and would like to get a final decision as to whether we were going to get along with them, go along with them in this application to OPA for 78-cent increase. That is the substance of that conversation on February 10th.

Q. What is the next discussion or communication of any kind you had with any representative of the defendant with reference to this subject?

A. On February 15th Mr. Wallace, I have a note here that on February 14th I telephoned to Wallace but he had gone to Modesto. Williams was catching a train for New York. That was done because Williams had asked me to give them the final decision before he went back to New York, but I was not able to catch him before he left.

On February 15th, Mr. Wallace telephoned to me and I said, "Why don't we let your auditors, Peat, Marwick & Mitchell, and let our auditors, Price, Waterhouse & Company, get together and [142] select a third person, let him arbitrate.

Mr. Rosenberg: Pardon me for interrupting. May I have the purpose of this testimony?

Mr. Bennett: It is to show the statements of the parties—

Mr. Rosenberg: To show there was a difference of opinion between—

Mr. Bennett: I want to show the declarations of these parties. It seems to me to be in issue, and I think without repeating what we repeated so many times, the nature of this case, the controversy.

(Testimony of C. Bruce Flick.)

before the court, that these conversations and the actions of the parties involved in this case should be before the court.

'The Court: Proceed.

Mr. Bennett: May I have the reporter read the last two or three lines?

(The record was read by the reporter of the witness' last answer.)

The Witness (Continuing): "Let them select a third party to arbitrate the question of the correctness of the increase of 78 cents per ton, and at the same time to make a definition of the term 'actual cost of production,' that we could follow in the future, actual cost of production." I said Pacific would be willing to abide by the findings of the arbitrator, and we would split the cost of the arbitration [143] between us. I said, "It seems to me the definition of cost ought to be made a part of the contract in the appropriate manner, and there ought to be provision to have the escalator clause operate downward as well as upward."

Wallace said, "That sounds reasonable," and he said he would wire it to Williams on the train so he would have it when he got to New York. That is the substance of that.

Q. At the time of this discussion I think counsel will agree the terms of the contract only operated upward, as far as the escalator clause was concerned; the escalator clause never worked downward, did it?

A. No; the escalator clause was only working upward, which was one of the reasons as an ac-

(Testimony of C. Bruce Flick.)

countant that I considered that the accounting practice they were using was improper to interpret under the contract.

Q. Well, as I understand it, at the previous conversation Wallace or Williams had suggested that perhaps they would consider a revision of the contract, the provision for the escalator clause working downward as well as upward.

A. Yes; that was the impression I had from my conversation with them, it seemed to be reasonable.

Q. Let's go to the next conversation you had with either of these parties, or with any representative of the defendant.

A. On February 17, 1944, Mr. Wallace came to my office, bringing a telegram that he had from Mr. Williams, and he showed [144] that to me and in that wire Mr. Williams said that he would refuse to arbitrate because Peat, Marwick & Mitchell were insisting that their accounting practices were correct, and Williams said that was a matter for the executive committee of Westvaco, that he personally would vote in favor of shutting down the gypsum production as an unprofitable operation unless we were willing to go along with them and accept 78 cents a ton increase in cost, and he asked for a final decision. I said I was sorry they wouldn't arbitrate, because it seemed a fair and easy way to resolve a difference, and if a qualified man selected by Peat, Marwick & Mitchell and Price, Waterhouse would decide that Westvaco was

(Testimony of C. Bruce Flick.)

right we would be entirely willing to pay the increased price.

Mr. Wallace said Westvaco could not accept the arbitration because if it were decided against them they would be compelled to produce gypsum at a loss.

I said, "I think you are actually making a lot more money than your books show, because of your incorrect overhead allocations." Wallace said, for example, as an illustration of an item, he mentioned the plant guards, which was required by the Government. I said, "Gypsum is not a critical war product requiring plant guards." I said, "Guards must be required because the magnesium oxide and bromine and I don't think any part of the plant guards should be charged to this by-product gypsum." I pointed out to them, this was on the [145] subject of them stopping making gypsum, that the magnesium oxide would have to bear all their overhead cost. Wallace said, "Well, the studies show they would save money by stopping gypsum, discontinuing gypsum." I said, "I don't think you will on an out-of-pocket basis." Wallace said, "We hope we won't have to discontinue, or talk about discontinuing." I said I doubted whether you have a right to discontinue gypsum production because of this contract. Wallace said, "We will check with our attorneys." I said, "I will take it up with my management the question of our final decision, because you have refused an offer to arbitrate, and I will have to check with my superior." Both Wal-

(Testimony of C. Bruce Flick.)

lace and myself, as usual, expressed a desire to continue satisfactory relations under the contract. That is the substance of that conversation.

I did not quite understand Mr. Wallace's reference to gypsum as a loss, because of the overhead cost figure.

The Court: Is that all of this matter?

A. That was the substance of the February 17th conversation.

Mr. Bennett: I wanted to get a piece of chalk, your Honor.

The Court: I suggest you conclude with this and then you can come back.

Mr. Bennett: Except at this point I would like to have some figures in mind, but we can come back.

Q. Now, at the time, and according to the figures that were furnished you by the defendant then, Mr. Flick, what was actual [146] or direct cost of manufacturing the gypsum at its point of separation?

A. The actual or direct costs were a dollar a ton. That was the 1943 average, which we were discussing after the turn of 1944.

Q. That figure of \$1, you say, was the figure for twelve months?

A. Correct. For the year 1943 was their direct charge shows \$1 per ton, that is for labor, material—

The Court: Covering what period?

A. The calendar year 1943. The figure covered for the calendar year 1943, their average cost for the year 1943 was \$1 per ton direct charges.



(Testimony of C. Bruce Flick.)

The Court: And how much was the first year?

Mr. Bennett: That was the figure for which they were claiming this additional increase of 76 cents?

A. Yes, 78 cents. They were claiming an increase of 78 cents because they claimed there had been an actual advance in cost of manufacture from the calendar year 1942's cost and the cost for the calendar year 1943.

Mr. Rosenberg: May I interrupt? It is your statement now, Mr. Flick, that the only costs of production that you think were allowable costs for the year 1943 amounted to \$1?

Mr. Bennett: Well, the figure was—

Mr. Rosenberg: Let him answer it.

The Court: Well, clear it up. [147]

The Witness: I can answer it. The thing I was concerned with was not the cost charge, at that particular year. What I was concerned with under the contract was the actual advance in cost of manufacture comparing two 12-month periods. Now, for the year 1942, Westvaco showed a total cost with everything in there, overhead and all, of the 12-month period. Now, for the year 1942 Westvaco showed a total cost of everything in there, overhead and all, of \$1.93 per ton; for the year 1943 they showed a total cost of overhead and everything else of \$2.71, a difference as shown by Westvaco of 78 cents per ton. Between 1942 and 1943 that is a 78-cents-a-ton price difference they were asking for. On direct charges which I was

(Testimony of C. Bruce Flick.)

prepared to go along with—it was this: The direct charges for 1942 were 71 cents per ton of gypsum, and for 1943 the direct charges were \$1 per ton of gypsum, a difference of 29 cents a ton in the direct charges, which we were quite willing to pay, but Westvaco, in other words, was claiming a price of \$3.76, as shown—

Mr. Rosenberg: I understand that. All I was doing was attempting to clarify the point, you did not contend then and you don't contend now that the allowable, even under your version of the contract, that the allowable costs of production of gypsum in 1943 was only \$1 a ton.

A. I can't answer it "Yes" or "No," because of this reason: My job as an accountant here was concerned with the actual [148] advance of cost of production.

The Court: How can you say in 1943 it was \$1?

A. Westvaco's figures show that direct charges are labor, materials, power, fuel for 1943 was \$1 per ton, and for 1942 they showed 71 cents a ton, an increase of 29 cents per ton. What I am concerned with primarily is the advance, the actual advance in cost of manufacturing.

Q. But you conceded then and you concede now that even under your interpretation of the contract that the cost of producing this gypsum was more than \$1 a ton in 1943, and more than 71 cents a ton in 1942; is that right?

A. My position then was and still is that the only cost—at any rate, that costs of producing

(Testimony of C. Bruce Flick.)

this by-product gypsum under this contract for any 12-month period, for the purpose of comparing it with the preceding 12-month period for the purpose of ascertaining the actual advance in cost of manufacture would be direct charges for labor, material, power, fuel, supplies, for running that little gypsum department, where you dry and grind and ship this by-product, gypsum.

Mr. Rosenberg: Q. Well, you still have not answered the question, but I guess I am not going to get it. [149]

The Court: You at the outset indicate the cost of—what is this you have?

The Witness: These are figures furnished by Westvaco.

The Court: The cost of gypsum in 1943 was \$1?

A. The direct charges which they charged to gypsum in 1943 was \$1.00 per ton, yes, sir.

Q. Explain that to me.

A. Now, that \$1.00 per ton is composed of labor in operating the gypsum department there, the drier and grinder, 39 cents a ton; labor for repairing that equipment, 16 cents a ton; workmen's compensation insurance and social security taxes, 3 cents a ton; operating material and supplies, 2 cents a ton; repair material and supplies, 7 cents a ton; water, 1 cent; power, 18 cents a ton; gas, 14 cents a ton; total direct charges, \$1 a ton.

Q. Made up of those items? A. Yes, sir.

The Court: Does that explain it, counsel?

Mr. Rosenberg: No, it does not, your Honor. What I am trying to get the witness to say---in

(Testimony of C. Bruce Flick.)

other words, as I understand counsel's question, it is for the purpose of testing whether or not, if Westvaco discontinued selling gypsum at \$2.98 a ton, they would have sustained a loss. Now, I submit that that is incompetent in any event, because the question is what price were we entitled to under the contract. [150]

The Court: That is why I am allowing this testimony to go in, to find out.

Mr. Rosenberg: Yes, but for that purpose, then, I am trying to get the witness to say whether or not as an accountant he is contending that our total cost of producing gypsum, according to his version of the contract and good accounting practices, was only \$1 a ton in 1943. He should be able to answer that.

The Court: We are going out of bounds entirely. It was only because I wanted to clarify it. You will have an opportunity to cross examine.

Mr. Bennett: That is what I was going to suggest.

Q. In that \$1 a ton, they did not add shipping expense, did they?

A. That \$1 a ton did not include shipping expense. There was an additional shipping expense, but the shipping expense for the year 1942 was shown by them as 19 cents a ton and for the year 1943 was likewise 19 cents a ton, so they did not show any increase in shipping expense as between those two 12 months' periods.

Q. You are not questioning, or to state it other-

(Testimony of C. Bruce Flick.)

wise, state to the Court whether or not the shipping expense would be considered by you as an accountant and in relation to your position representing the plaintiff here, as being an item of cost included within the cost of production as that term is [151] use, in paragraph 6 of the contract.

A. Well, the contract uses the words "actual advance in the cost of manufacture."

Q. Yes.

A. Ordinarily an accountant would not consider that shipping expense was a manufacturing expense, but the contract does provide for a price per ton loaded bulk on board the cars at their plant at Newark, and we were quite willing to accept, therefore, shipping expense as if it were manufacturing expense because we felt that that was fair enough. We were talking about an escalator clause and a price loaded on board f.o.b. cars and so we were willing to say the cost should be the cost loaded on board cars. We were willing to accept direct shipping expense. Indirect or allocated shipping expense is different.

Q. What did you say the shipping expense is there?           A. 19 cents.

Q. So with the direct items, in accordance with defendant's figures for that year 1943, the direct costs \$1.00 plus 19 cents shipping, make a total of \$1.19?           A. \$1.19.

Q. That is your cost. Now, what did the defendant claim for 1943 as their total costs, including the allocation and the claimed cost of these



(Testimony of C. Bruce Flick.)

overhead and indirect items pursuant to their so-called national uniform system of accounting?

A. They claimed the total cost of \$2.71 a ton for the calendar year 1943.

Q. At that time that you were discussing with Mr. Wallace, you had agreed, as I understand it, to this 29 cents raise of their actual cost of manufacture, had you not?

A. Yes, we had no objection to the 29 cent increase.

Q. Or a total price to pay the company of—

A. \$3.27.

Q. \$3.27?

A. We were quite willing to pay \$3.27.

Q. Now, taking their total cost, then, as represented to you and claimed by their figures, everything, the indirect overhead of \$2.71, deducting that from \$3.27 left, even according to their own paper figures, a profit of 56 cents a ton, did it not?

A. That is correct.

Q. And yet Mr. Williams at that time threatened to shut down the plant because they could not operate at a profit?

A. That is correct.

Q. That is, they were threatening to put the gypsum, instead of selling it to you at \$3—

Mr. Rosenberg: Just a moment. That is found to be leading.

Mr. Bennett: Yes, it is. I withdraw the question. I think the facts speak for themselves. [153]

Q. Just to get back to the evidence, as I understand it, on February 17, Wallace said what with

(Testimony of C. Bruce Flick.)

reference to meeting their demands that they would do if you refused to meet their demands?

Mr. Rosenberg: That has been asked and answered. He is asking him to repeat something—

Mr. Bennett: Well, it is. Because of the subsequent colloquy and arguments here, I did not know but what we might have confused His Honor and I did not want to have it result in that.

The Witness: Well, he said their studies showed if they cut out the gypsum they would save money.

Mr. Bennett: Q. I understood something was said concerning a possible—

A. Mr. Wallace said they could not accept the arbitration that we proposed because if they lost the arbitration they would be in the position of being compelled to produce gypsum at a loss.

Q. Was anything said at that conversation with reference to refusing to deliver or produce gypsum?

A. Williams said in his telegram, which Wallace showed to me, that Williams would vote in their executive committee meeting in New York in favor of shutting down the gypsum production unless we would go along with them and accept the entire increased price of \$3.76 a ton.

Q. Did that complete your February 17 conversation with Mr. [154] Wallace? A. Yes.

Q. When is the next communication you had with the defendant or its representative with reference to this controversy?

(Testimony of C. Bruce Flick.)

A. We wrote them a letter on February 28, 1944.

Q. I hand you herewith a copy of a letter and ask you if the original of that letter dated February 28, 1944 was addressed to Mr. W. K. Wallace, Western Manager, Pacific Chlorine Products Corporation at Newark, California.

A. That is a copy of the letter.

Mr. Bennett: I offer this letter in evidence as the next exhibit in order.

The Court: Let it be admitted and marked.

(The document in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Bennett: I read the letter, your Honor, addressed, as I have previously indicated:

"By letter dated January 14, 1944, you advised us that 'the actual advance in Westvaco Chlorine Products Corporation's cost of production on gypsum for the 12 month period commencing January 1, 1943 and ending December 31, 1943, over the 12 month period commencing January 1, 1942 and ending December 31, 1942, was 78 cents per ton,' and gave us notice that commencing on the 15th day of March 1944 the price to be charged for all guysum delivered to us by you would be \$3.76 per ton. You also [155] advised us that an application will be made to the Office of Price Administration for an order confirming and authorizing the above increase in price.

"Since that time a number of conferences have been held between your representatives and our

(Testimony of C. Bruce Flick.)

own for the purpose of determining whether or not the facts actually entitle you to such an increase under the provisions of our contract.

“During these conferences we have indicated to you that we consider that you are entitled to some increase based upon your representations as to your accounting and operating practices, but we question that the facts entitle you to the entire amount for which you have asked.

“We could not represent to the OPA that if an increase in the maximum price is granted to you, we would not ask for an increase in our resale price.

“In view of your desire for an early determination of your right to an increase under the contract and our mutual inability to agree as to the underlying facts, we advised you of our willingness to arbitrate any questions which might exist between us, but this we understand you have refused to do and have asked us for our final decision. In answer to this, we must tell you that we have at all times been and now are willing to carry out our obligation under the contract, and hereby renew our offer to take all reasonable steps to have any questions which might exist between us determined by any reasonable method or in any reasonable manner. [156]

“Very truly yours,

“Pacific Portland Cement Co.,

“By C. B. Flick,  
Controller.”

(Testimony of C. Bruce Flick.)

Q. Following that letter, or on the same day, was there a further conference or any communication between you and any representative or representatives of the defendant corporation?

A. On the same date, February 28, 1944, Mr. W. K. Wallace, the western manager of the Westvaco, came to my place and said if we won't go along on this price increase of 78 cents a ton, and if we won't give them a letter stating we will not ask the OPA to authorize any increase in our own resale price, then they will suspend deliveries and discontinue production of gypsum on March 1, 1944. Wallace told me in their experience with the OPA, where the buyer signified a willingness to absorb the price increase and not pass it on to his customer, the OPA would act quickly, and maybe they could get their application approved in two weeks, but where the buyer was going to pass on the price increase to the consumer, that OPA was much more difficult to approve and that OPA would take maybe four months to render a decision in the matter, and that Westvaco was not willing to absorb what he called a loss on the gypsum for any additional period of time.

I said, "How can you suspend deliveries on March 1? On what ground?"

Wallace said, "Because we would not go along with them on [157] the price increase."

And I said, "Under any circumstances you are not entitled to a price increase until March 15 because we have our 60 day notice from January



(Testimony of C. Bruce Flick.)

14 to March 15. You are not entitled to suspend gypsum."

Wallace said, "I will recheck with Williams in New York. Maybe I misunderstood and maybe I was supposed to tell you this not later than March 1."

And he said they had four different procedures of which they might avail themselves. Discontinuing deliveries was only one thing they might do.

I said, "What are the other things?"

He said, "I neglected to find out from Williams."

Wallace said, "If Pacific applied to OPA for authority to pass on the price increase to Pacific's customers, that OPA would probably turn it down because of the fact that Pacific would still have a profit in dealing in the gypsum, and that if Westvaco would discontinue production, that might help to speed up the OPA action because then it would show that the price increase was necessary in order to maintain the production of gypsum."

Well, Wallace also said that they did not have to make gypsum. They might precipitate two other commodities in place of gypsum, and they would make more money doing it. He said he would send a long airmail to Williams in New York, the letter [158] just referred to here of the same date, February 28, 1944, and that he would phone me on March 1st, expecting to have a reply. And I said, "I will tell my management what you have said." That was the substance of that conversation.

(Testimony of C. Bruce Flick.)

Q. What was the next communication or conversation you had with the defendant or any representative concerning this same subject-matter? To save time, Mr. Flick, I hand you herewith a letter dated March 2, 1944, on the letterhead of Westvaco Chlorine Products Corporation, Cable Caustic, New York.

“Please reply to Chrysler Building, 405 Lexington Avenue, New York 17, New York. March 2, 1944.” Addressed to: “Pacific Portland Cement Company, San Francisco,” and signed, or purported to be signed by Max Seaton, Executive Vice President. Did you receive the original of that letter from Mr. Seaton shortly after the date thereof?

A. Yes, we received the original of this letter. I remember that.

Mr. Bennett: I will offer this letter in evidence, if your Honor please.

The Court: It may be admitted and marked Plaintiff's exhibit next in order.

(This document in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Bennett: The letter reads as follows, your Honor: [159]

“This will acknowledge receipt of your letter of February 28th, addressed to our Western Manager, Mr. W. K. Wallace, which Mr. Wallace has forwarded to this office for attention.

(Testimony of C. Bruce Flick.)

“Our advice to you in our letter of January 14, 1944, concerning an increase in the price of gypsum, was made in accordance with the provisions of our contract and our books of account which disclose the cost elements which make up this increase are, in accordance with our contract, open to your inspection. In consequence, we see no reason for submitting this question of price increase to arbitration.

“It had been our intention to apply to the Office of Price Administration for an increase of the Maximum Price on our gypsum delivered to you under our contract of January 29, 1937. However, in view of your indication as to your inability to represent to the OPA that an increase in our price to you would not result in an increase in your resale price, we do not feel that such application is warranted.

“Because of the prohibition against our advancing the price of gypsum in accordance with the provisions of our contract of January 29, 1937, we hereby notify you that on March 15th we shall suspend the delivery of gypsum to you until such time as it is possible to invoice deliveries [160] at prices adjusted in accordance with the terms of that contract.

“Very truly yours,

Westvaco Chlorine Products  
Corporation,  
Max Y. Seaton,  
Executive Vice President.”

(Testimony of C. Bruce Flick.)

Mr. Bennett: Q. Did you reply to that letter, or to your knowledge did any representative of the plaintiff reply to it?

A. I believe the next thing that happened after that letter was my phone call to Mr. Wallace on March 10, 1944. I said, "If you suspend deliveries what are you going to do with the gypsum?"

And Wallace said, "I don't know. I haven't heard from New York."

And I said, "Have you got any objection to my calling Dr. Seaton, myself, on the telephone?"

And he said, "No objection whatever."

So I called Dr. Seaton on the telephone the same day and told him we had just gotten this letter of March 2, 1944 on March 7th, and that our executives were up in Oregon for the past three weeks.

The Court: Pardon me.

The Witness: I said we had just gotten his March 2nd letter. We received it on March 7th, and our executives had been up in Oregon for the past three weeks, and it somewhat handicapped us in our handling of the matter. I told Dr. Seaton [161] I had asked Wallace what they were going to do with the gypsum, and whether they were going to discontinue production of it altogether, or what, and Wallace had given me approval to call Dr. Seaton direct.

Dr. Seaton said, "I really don't know at this point."

I said, "Well, of course, we take that March 2nd letter of yours as a formality because we certainly

(Testimony of C. Bruce Flick.)

want to continue on and I think you people do. I think both parties want to continue on under the contract."

And Dr. Seaton agreed as a general principle and said they felt it necessary to put themselves on record in the matter. .

I said, "Our executives being away, and the delays that have happened, won't you postpone the discontinuance of the production of gypsum until you get out here?"

He was expecting to come to San Francisco in April.

"And let us discuss the whole matter with Dr. Seaton when he gets here in April."

He said, "Well, my travel plans are indefinite, as all such plans are because of war conditions. I do not see any reason in deferring it. It should be faced squarely now."

I said, "I will try to get in touch with my people."

That was the substance of the conversation of March 10th.

Mr. Bennett: Q. Did you make any further communication or have any further communication with the defendants?

A. I phoned Mr. Wallace on March 11th and I said, "Now, here, [162] we will go along with you fully in your application with the OPA in order to get you over this hurdle of a price regulation, a frozen Maximum Price, because we recognize that we can go to the OPA for a \$3.76 ceiling price



(Testimony of C. Bruce Flick.)

or maximum price, but under OPA regulations you can always change a lesser price, and in order to get over this OPA thing which is stopping you, we will go along in your application to OPA, but with the understanding that after we get the OPA approval for a \$3.76 maximum price we will decide and work out what the actual price to be charged should be."

And I said also, "You are asking us to give up our right to pass that increase along to our customers. You are asking us to go on record with the OPA that we will absorb this price increase and for us to tell the OPA that we won't pass it on to our customers. Now, you are asking us to give up something. How about some consideration for giving this up? It seems to me this escalator clause ought to work downward as well as upward. It seems to me under any circumstance we do not want to go along with having this 11 cents a ton for new products research as a part of the maximum price, and I think we ought to go further into this question of getting this difference ironed out and get this term 'cost of production'—our differences on that ironed out for the future so we will go along and get away from all this dispute and discussion."

I asked Wallace if he had any objection to my phoning [163] Seaton. Wallace said he would rather phone, himself. He was anxious to get the matter straightened out, and he thought he might be able to sell Dr. Seaton better than I could, and

(Testimony of C. Bruce Flick.)

so he said he would call him up and let me know after he did so. That was the substance of that conversation.

Q. What was your reason for being willing to go along with him, or, rather, have you fully stated your reasons for finally acceding to their demands to agree with OPA that you would not increase your prices if OPA granted them a maximum price increase?

A. We, naturally, having this long term arrangement to buy this by-product gypsum, we were obligated under the contract to buy all of it, except the 4000 tons. We had made plans and commitments of our own for the use and disposal of this shipment, and we did not want them, frankly, to discontinue its production.

Q. As had been threatened?

A. They were giving us notice that they were going to discontinue the production unless we went along and paid them the price they wanted. We did not want them to discontinue the production. Basically, that was the reason we were willing to go along. We did not want them to discontinue production. We had plans for it. We had commitments for it. And we did not feel that—we did not like the idea of having to give us our right to pass on an increased price to our own [164] customers, but we thought if we could get them to agree that the escalator clause should work in both directions instead of just moving upward, that maybe we could trade a little bit on that, but the real reason

(Testimony of C. Bruce Flick.)

we went along on that application for maximum price of \$3.76 was because we did not want them to stop making gypsum.

Q. And you reserved the right—

Mr. Rosenberg: Mr. Bennett—

Mr. Bennett: All right.

The Court: It is time for recess.

(Recess.)

Mr. Bennett: Mr. Flick, I show you a copy of a letter dated March 11, 1944, addressed to the Westvaco Chlorine Products Company, New York, New York, attention Dr. Max Y. Seaton, Executive Vice President, purporting to be signed by Pacific Portland Cement Company, by C. B. Flick, and also another letter addressed to the same parties and the same date, purporting to be signed by you and ask if the original of those two copies were sent to the persons to whom they were addressed on or about that date?

Mr. Rosenberg: I will stipulate they were.

The Court: It is stipulated.

The Witness: A. Yes.

Mr. Bennett: I offer this letter, or these two letters in evidence as the Plaintiff's next exhibit.

The Court: Admitted and marked.

(The letters referred to were marked Plaintiff's Exhibit 8 in evidence.)

Mr. Bennett: The first letter addressed to Dr. Seaton, Executive Vice President, reads:

(Testimony of C. Bruce Flick.)

“Air Mail

March 11, 1944

“Westvaco Chlorine Products Corporation

Chrysler Building

405 Lexington Avenue

New York, New York

Attention: Dr. Max Y. Seaton, Executive Vice-  
President

Gentlemen:

This is to confirm telephone conversation today between the writer and Mr. W. K. Wallace, your Western Manager, in which we agreed as follows:

1. You will proceed at once to file your application with the Office of Price Administration for an increase to a maximum price of \$3.76 per ton for your gypsum delivered to us under our contract of January 29, 1937, effective on March 15.

2. Enclosed is a letter which is to be attached to your application to O.P.A. in which we agreed to a maximum price of \$3.76 and state that we will not ask O.P.A. for a corresponding increase in our resale price.

3. In anticipation of O.P.A. approval of your application, which will make it possible for you, effective on and after March 15, to invoice deliveries at prices [166] adjusted in accordance with the terms of our contract, you will not suspend delivery of gypsum to us.

4. The escalator clause in the contract is interpreted to operate downward as well as upward.

(Testimony of C. Bruce Flick.)

5. When Dr. Seaton is here in April, we shall negotiate the question of interpreting the term 'cost of production' so that any and all questions shall be determined as a basis for adjusting prices in future in accordance with the contract, and to determine whether any price less than \$3.76 should be charged during 1944.

Very truly yours,

Pacific Portland Cement Co.,  
By C. B. Flick,  
Controller."

The second letter of the same exhibit, same date, refers to the same Dr. Seaton, Vice-President of the defendant, and reads as follows—this is the letter, your Honor, that they had requested to be sent so they could send that to the Office of Price Administration:

"Referring to our contract dated January 29, 1937, you have advised us that your cost of producing gypsum has increased and that pursuant to the provisions of the contract you are entitled to an increase in the price of gypsum delivered to us, effective on March 15, 1944, to \$3.76 per ton. [167]

"You have also advised us that you are filing an application with the Office of Price Administration for an order authorizing the above increase in permitted maximum price.

We agree that if this price increase is allowed by the Office of Price Administration, we shall not ask the Office of Price Administration for any in-



(Testimony of C. Bruce Flick.)

crease in the prices to be charged by us to our customers for any of said gypsum received by us from you.

Very truly yours,

Pacific Portland Cement Co.,

By C. B. Flick,

Controller."

On the same date, about that time, did you have a further conversation with Mr. Wallace, or anyone representing the defendant corporation?

A. On the same date, March 11, I telephoned Mr. Wallace and we agreed over the telephone along the lines of these letters. I then made the letters up and then I called Wallace back on March 11th and read the letters over the telephone, and he said they were okay, and then I put them in the mail to Dr. Seaton. On March 13th—the letters having been sent airmail, on March 13th Wallace telephoned me and read me a telegram that he had received from Dr. Seaton, stating that he had received my letter of March 11 and the Westvaco were going to go ahead and file the application with OPA and pending decision by the OPA Westvaco [168] would continue to deliver gypsum to Pacific. He said he was confirming my letter.

Q. That was on March 11, 1944?

A. March 13th.

Q. Did you receive any information from the defendant as to—

Mr. Rosenberg: Pardon me. Did he say he re-

(Testimony of C. Bruce Flick.)

ceived the letter from Dr. Seaton in response to that?

Mr. Bennett: No.

The Witness: Dr. Seaton—Wallace told me Dr. Seaton was writing to me. There was a letter that came in after that from Dr. Seaton.

Mr. Bennett: Well, here it is.

Mr. Rosenberg: Will this be admitted in evidence?

Mr. Bennett: I offer as Plaintiff's exhibit next in order letter written by Dr. Seaton, of New York, dated March 13, 1944, to Pacific Portland Cement Company, Attention Mr. C. B. Flick.

The Court: Admitted and marked.

(The document was marked Plaintiff's Exhibit 9 in evidence.)

Mr. Bennett: I will read the letter:

"We are in receipt this morning of your letter of March 11 with reference to the question of gypsum price increase which has been under discussion with you.

"In view of your letter and of the attached letter, which we may use as an exhibit in our application for gypsum price adjustment to the OPA, we will not suspend delivery [169] of gypsum to you on March 15, as my letter of March 2 indicated we would, but will continue to deliver as in the past pending determination of the OPA's decision on our price increase application which will be before them within the next few days.

(Testimony of C. Bruce Flick.)

“My present plans call for me to reach California during the week of April 9th and during my stay in the West I will be very glad to discuss with you the development of more precise understandings regarding the meaning of the term ‘cost of production’ which is included in our contract with you.

Very truly yours,

Westvaco Chlorine Products  
Corporation,  
Max Y. Seaton,  
Executive Vice President.”

Q. Did you have any meeting with Dr. Seaton after that, Mr. Flick? Did he come out to California?

A. He did come out about the middle of April and we had a conversation with Dr. Seaton, and we went all over the same ground that I had been over with Wallace and Williams; we discussed the by-product question and we discussed what should be charged on the costs of production, and so forth, and the net result of the conversation was nil. He reiterated Westvaco's position, that they were entitled to keep their accounts by the uniform accounting system, and that although the contract may have referred to gypsum as a by-product in their accounting [170] system they did not recognize any special treatment for by-products as distinguished from what they call joint products or co-products, and they were entitled to the full \$3.76. I argued with him quite a bit about it, about

(Testimony of C. Bruce Flick.)

the new products research, for which they charged 11 cents a ton increase in the price, and he maintained that in the Westvaco practice that they allocated new products research along with all the other overhead, and we just did not get anywhere. We later had a brief conversation in Mr. McCarthy's office with Dr. Seaton—

Q. Who is Mr. McCarthy?

A. Mr. J. McCarthy, the president of the Pacific Portland. I was present. I am quite sure Mr. Wallace was present—Mr. Wallace, Mr. Seaton, Mr. McCarthy, and myself, and they talked generally about the desire of both parties to get along under the contract and live together in an amicable manner, and so forth, and Mr. McCarthy was going East, but nothing ever came of that.

Q. You later advised—I think before we start that—Counsel, we can stipulate that OPA did not grant the price increase?

Mr. Rosenberg: That's right.

Mr. Bennett: You continued to make deliveries at the so-called freeze price?

Mr. Rosenberg: \$2.98.

Mr. Bennett: I am going to touch now on a subject that does not particularly relate to this paragraph 6, Raise in [171] price, and so forth, your Honor, but it follows along chronologically, and for that reason I will pass to that particular subject now.

Q. Did you have any further conversation in 1946, the month of June, with any representatives

(Testimony of C. Bruce Flick.)

of the defendant with reference to any matters in this contract under question or dispute, or pertaining to the contract, Mr. Flick?

A. In June of 1946, or the 13th of June, Mr. Wallace and Mr. Kenneth Ray came to my office.

Q. Pardon me. Is that the same Mr. Ray who is counsel for the defendant?

A. Yes, and brought up the subject of the specifications of gypsum and deductions from our remittances which we had been accustomed to make each month for any gypsum that might be below 95.51 percent gypsum value. They said Westvaco had never accepted the charge-backs and that they had been accumulating on their books, the deductions which we had made, that they did not consider correct, and that they had a balance as an account receivable due from Pacific in the neighborhood of \$9500.

I said, "That is the first time I ever knew that you fellows had any such account on your books that you consider as being due from us." Mr. Ray said that annual statements had been sent to Pacific, either by one of the accountants or by their auditors, Peat, Marvick & Mitchell in the course of auditing confirmations, and he believed the statements had [172] been returned. I said I never saw any such statements, I never saw any audit confirmations, and while Mr. Wallace and Mr. Ray were there I called on the telephone Mr. Schoning, our assistant secretary and the man in the accounting department, who handles some accounting de-



(Testimony of C. Bruce Flick.)

tails, and he would be the one most likely to see them. He said he never saw any such statements. I said, "I have never before been advised of the existence of this claim," that Mr. Wallace had been coming in to see me frequently in 1944, and at intervals thereafter, and had never mentioned the matter of having an account due on their books, that monthly checks with the deductions had always been cashed. Wallace said, "Well, we will write you a letter and discuss this claim and Mr. Ray will discuss the matter later on as to the contract and the reasons why Westvaco considered the charge-backs wrong." And he told me Mr. Ray would prepare such a letter on his return to New York.

Q. Did you ever receive such a letter from Mr. Ray?

A. I don't recall receiving a letter from Mr. Ray on the subject. Mr. Wallace subsequently did come in with statements.

Q. That is a statement claiming how much?

A. I believe when they sent this statement they finally had an aggregate sum of \$11,000.

Mr. Bennett: Now, for your Honor's information, this is the matter that is involved in the second count of the complaint. Your Honor is familiar with that paragraph, paragraph 5 of the [173] contract, if the gypsum content falls below 97.51 percent, they are subject to a 2 percent tolerance, the plaintiff may deduct 10 cents per ton for each percentage that it falls below.

(Testimony of C. Bruce Flick.)

Subsequently, in connection with that, did the defendant ever reduce its claim to a less sum than this \$11,000, or \$8,000, whatever it was?

A. They subsequently did. I believe their present claim is something like \$1600.

Mr. Rosenberg: \$2100.

The Witness: \$2100?

Mr. Bennett: Q. As I explained to the Court, you have since tendered a check for \$500 which was for what purpose?

A. It was brought to my attention that there were some deductions that seemed to have been made for gypsum which was below 97.51 percent, although it was still above 95.51. The contract said that the gypsum, if the gypsum is below 95.51 you have this charge-back privilege, but when you compute the amount charged back, or the amount of the charge-back, you go back up to the amount below 97.51—it is a little confusing. It was called to my attention some deductions seemed to have been made for gypsum that was off about 2 percent, so I had the boys in the accounting department make a thorough check going back to the end of 1940, and went right through in detail and we found there seemed to have been quite a little period of time in there when one of the clerks in the accounting department [174] seemed to have been confused, and he was charging back every bit of gypsum that was below 97.51, even though it might be up to 96.51. Then we tendered a check in the amount of around \$525, some such figure, coun-

(Testimony of C. Bruce Flick.)

sel advised me that about half of it had been outlawed by the statute of limitations, but we said we will skip that, and we tendered the check for the entire amount, and Westvaco had sent it back and said that we had breached the contract, because of making these erroneous deductions, and we sent it back again to them without prejudice, and they said that that was one of the issues involved in this suit, so they did not take our check.

Mr. Rosenberg: That was by letter, wasn't it?

A. Yes.

Mr. Rosenberg: They also said that the further reason for not accepting the check was that the computation was made on the basis of Pacific's chemical analysis, whereas we were contending our chemical analyses were correct; isn't that correct?

A. I don't recall exactly what was in that last letter.

Mr. Bennett: If you are concerned about that point let's get the letter, counsel.

The Witness: I have the letter.

Mr. Rosenberg: Here is the letter.

Mr. Bennett: Do you want the letter in? I have no objection.

Mr. Rosenberg: No. [175]

Mr. Bennett: Why make so much ado about nothing? I perhaps should not have gone on to this chronologically, but I thought in passing it was a small matter that we might dispose of.

Mr. Rosenberg: You mean the cost of production dispute?

(Testimony of C. Bruce Flick.)

Mr. Bennett: Yes, the dispute with reference to the books.

The Court: They spread between the \$500 and \$2100.

Mr. Bennett: That is the issue involved in the second count. I have got that letter, and I have the attached check. Really, this is the defendant's case. I don't know, I am perhaps making a mistake in bothering with it at this time, because it is really the defendant's case, and maybe it is technically a mistake for me to be offering the document that is really a part of the defendant's case, and I will submit to your Honor that any documents we have, of course, would be available to them in that connection.

Q. The difference of the total claim that they are making now for alleged excessive deductions is \$2120.42, of which you tendered, you say, \$539.24, which you have discovered as error in the manner in which you have explained it, and that leaves as claimed here a sum of \$1620.42, on deductions that you made which involves the dispute which in turn involves the sum of \$1620.42, and were made pursuant to—

A. Well, the contract carries that clause.

Q. You are referring to the provisions of paragraph 5 of the [176] contract?

A. If that was the proper number of it. It provides on any gypsum which has a gypsum value of less than 95.51 percent we may make a deduction of 10 cents per ton for each percentage, that it

(Testimony of C. Bruce Flick.)

falls below 97.51, so that these charge-backs or deductions in our monthly remittances were computed by our accounting department each month based on reports of chemical analyses of the gypsum which we received from our plant laboratory at Redwood City plant.

Q. Prior to the time Mr. Ray and Wallace came to see you in June, 1946, you had sent regularly or monthly or other periods of time checks to them as payment for the period that you have received gypsum during the preceding period?

A. We had sent checks every month. The contract provides, as I recall it, for the payment by the 15th of each month for the gypsum delivered during the preceding calendar month, and it had been our custom to send checks each month, and we accompanied the checks with a little list if there were any of these charge-backs, and we deducted the amount of these charge-backs and sent a check for the net amount, the amount billed by Westvaco, less the charge-back.

Q. Were those checks cashed by the defendant?

A. Yes, they were all cashed.

Q. Prior to Mr. Ray and Mr. Wallace visiting your office on June 6th had anyone representing the defendant questioned the [177] amount by you or the propriety of these deductions in the amount of the check that was sent, which was cashed?

A. No one from Westvaco ever asserted any claim to me. Mr. Wallace stated on numerous occasions that they did not like the fact that deduc-



(Testimony of C. Bruce Flick.)

tions were made, that their New York office did not like to see deductions made, and they thought wherever we could use the gypsum by disposing of the gypsum without having somebody make a deduction from us, that we ought not to make that deduction from Westvaco. I replied, "Well, the contract provides for it." No claim was ever asserted until Mr. Wallace and Mr. Ray came into my office and told me they had this amount open on their books. I was quite surprised. [178]

Q. Where did these samples come from that were examined, upon which you made or determined the amount, if any, of deductions?

A. We received samples at our laboratory, at our plant at Redwood Harbor, California, from two sources. Most of the samples came from Westvaco. They sampled the gypsum as shipped from Westvaco to wherever we told them to ship it, and some of the gypsum, however, would be shipped by them to our own Redwood City plant. I believe that on the gypsum that was shipped to our own Redwood City plant we took samples ourselves from the cars as they arrived at Redwood City. By far the greater part of the samples, ever since the contract began, were taken by Westvaco at Newark and furnished to us at our plant at Redwood City.

Q. That is, every time a car—

A. Every time they shipped a car they would take a sample, so the laboratory reports of the analysis of the gypsum for years and years were

(Testimony of C. Bruce Flick.)

always on the basis of one sample for each carload. The chemical analysis report gave the car number in fact and our charge-backs were car by car. I might say that there are between 50 and 55 tons of this gypsum in the typical freight car load.

The Court: Q. How many tons?

A. Between 50 and 55 tons.

Q. In a carload? A. In a carload. [179]

Mr. Bennett: Q. The defendant lately has asserted or claimed the right to submit samples on the basis of what, Mr. Flick?

A. Well, about a year ago, instead of furnishing samples, one sample for each freight car load, they began to furnish us with what they call a composite sample, representing about one week's production, or about 20 carloads, and they refused to furnish a sample each carload any more. They sent this composite sample, and they have continued that during the past year.

Q. Have you agreed, or have you objected to that?

A. We objected immediately when they began to furnish these composite samples. We asked them to continue to furnish a sample of each car as they had done for nearly ten years, or nine years, and they said, "No, we will give you a sample for each week's production, or about 20 cars, a composite sample."

Q. Do you consider that that new practice that they insisted upon, the changed practice, is adequate?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: I will object to that as incompetent, irrelevant, and immaterial; furthermore, if the Court please, there is nothing in the contract obligating anyone to furnish that.

Mr. Bennett: Q. What was the reason expressed to you by Mr. Wallace for that change in furnishing samples?

Mr. Rosenberg: When, Mr. Bennett?

Mr. Bennett: Well, whenever this matter was discussed, [180] whenever any reason was given.

The Witness: Mr. Wallace, and Dr. Seaton, and our Mr. Bannard and I had a conversation at Westvaco's Newark plant in the latter part of 1946, after Mr. Bannard had looked over their figures. I believe that was in October of 1946. Mr. Wallace said that they were discontinuing the car-by-car samples, because it was too costly, and another reason he stated to me was it would do away with a lot of these charge-backs, because you would have obviously an averaging out of good and bad in a 20-car sample.

Q. That was the only reason expressed for the change?

A. Those were the only two reasons I ever learned. Later on, after the suit was filed, when I questioned the matter of samples and again asked for a car-by-car sample, they replied by letter asking the same question that Mr. Rosenberg has indicated. They said, "Please tell us under what provision of the contract we are obliged to furnish you samples?" I do not believe I answered that letter.

(Testimony of C. Bruce Flick.)

Q. Let us get back to the big business at hand, Mr. Flick. I wanted to show on this matter of sampling you are entitled to some adequate basis, but I won't take this time of the Court to go into that. We can argue that at a later juncture.

To get back to the price protection clause and the cost of manufacture of gypsum and the actual advance, if any, in the cost of production and manufacture of gypsum, when, if you [181] know, Mr. Flick, was the first decontrol of gypsum by OPA?

A. The first decontrol of gypsum by OPA was on September 4, 1946. OPA decontrolled gypsum when used as a cement retarder on September 4, 1946.

Q. A large part of this gypsum that you had purchased through the years from the defendant being used as a cement retarder?

A. Yes, a very substantial portion of it. It varied a little from time to time, sometimes more, sometimes less, but cement retarder was a very substantial use for this Westvaco gypsum.

Q. And that fact was known to the defendant?

A. Oh, yes.

The Court: Q. I do not follow that entirely. What do you mean by "retarder"?

A. May I explain that in the manufacture of Portland Cement the last thing you do, after you have made the Portland cement clinker out of the ground-up limestone, you have a little clinker, and in the final step of the finish grind you add in gyp-

(Testimony of C. Bruce Flick.)

sum; between 2 and 3 percent of Portland cement is gypsum that is mixed in by a physical process of grinding in the last stage.

Q. Keeping in mind the date of September 4th, when OPA first decontrolled gypsum as a cement retarder, when is the next time that you had any communication or conversation with the defendant or any of his representatives with reference to the price that you were to pay for the gypsum, or this controversy [182] over the so-called escalator clause?

Mr. Rosenberg: Mr. Bennett, so that I can understand the question, when you are talking about the escalator clause—

Mr. Bennett: I am talking about paragraph 6 of the contract.

A. On August 31st, which was Saturday—after August 31st, which was Saturday, Westvaco discontinued shipping gypsum. September 1st was on Sunday. September 2nd was on Labor Day, as I recall it. Gypsum was decontrolled as a cement retarder on September 4th, and on September 5th Mr. Wallace told me that they had quit producing and shipping gypsum and would not produce and ship any more gypsum for an indefinite time in the future, until such time as Pacific acceded to their demands, and their demands were, No. 1, that we quit arguing about this price and pay them \$3.76 a ton, and they also wanted us to accept their claim against us for these specifications charge-backs for the past, and they wanted us to



(Testimony of C. Bruce Flick.)

agree that there would not be any more future charge-backs on account of gypsum percentage in any instance where we, ourselves, were able to resell the gypsum without having our customer make a charge-back against us, or in any case where we, ourselves, used the gypsum, and they also wanted us to agree that we would give up another point that was in dispute, as to whether we were obligated to take the entire amount of this production in a calendar year where they had told us, for example, "We are going to produce 40,000 tons under the contract. You have the right to refuse [183] more than 20,000 tons. At the same time, under the contract, we had the right to refuse more than 2000 tons in any one month." We maintain those two rights were separate and distinct. Westvaco said they were all part and parcel of the same thing. "If you say you are going to take 40,000 tons, you have to take it all in equal monthly installments." As I understand those were the points then at issue with them, and they said, "Unless you give us what we want on those points, we are just not going to make any more gypsum until further notice at an indefinite time in the future." They did not make any more gypsum.

The OPA decontrolled gypsum as a cement retarder on September 4th, and as far as OPA was concerned they were then free to increase the price of gypsum.

Mr. Bennett: Q. You were advised that they did stop the grinding and drying and delivering and making of gypsum?

(Testimony of C. Bruce Flick.)

A. Mr. Wallace told me that they had quit producing this gypsum. They said, "We are running slurry into the bay." And I remember the conversation quite clearly.

I said, "How can you run the slurry into the bay? It has your magnesium chloride in it."

He said, "Oh, of course, we filter it."

I said, "Well, what you are running into the bay, then, is gypsum."

"Oh, no," he said, "that is not gypsum."

But they continued then to run this by-product into the [184] bay. They no longer dried it, and ground it, and shipped it, but they ran the by-product into the bay until Mr. Wallace later informed me that they had resumed shipments on September 13th—

The Court: Q. What time elapsed, approximately?

A. Approximately two weeks when there was no production or shipment of gypsum.

The Court: Proceed.

Mr. Bennett: Q. Go ahead. Relate the next conversation or happening, Mr. Flick?

A. Well, on September 13th we agreed with them on a basis in which they would resume the drying and grinding and delivery of this gypsum, and we embodied that in a letter which we wrote to them to record our understanding of the basis on which they were to resume production and shipment.

The Court: Q. What date?

(Testimony of C. Bruce Flick.)

A. The letter is dated September 13, 1946. I was continuing in negotiation with Mr. Wallace for several days before I found out that they had already started to resume on September 13th, and we wrote two letters on September 13th. The first was a longer letter and the second was a shorter letter. The second was intended to supersede the first, but Westvaco replied to those two letters by a letter which they wrote dated September 23rd, and also by a letter of September 13th, 1946, they served notice that the price would again go up, effective [185] 60 days from then, because, they stated, there had been another increase in the cost of production, and that the price would go up effective, I believe, November 13th, from \$3.76 to, I believe the original price claimed was \$4.62. It has been reduced since by some corrections they have made, so at present it is \$4.36.

Q. That is the total amount that they are presently claiming, including this third claimed price increase?

A. Yes, the amount that they now claim after making some corrections which they made is now \$4.36.

Q. But originally the demand was—

A. \$4.62, I believe.

Mr. Bennett: I offer this letter from Westvaco Chlorine Products Company, the defendant, dated September 13, 1946, to the plaintiff, Pacific Portland Cement Company, and purporting to be signed by W. K. Wallace, Western Manager.

(Testimony of C. Bruce Flick.)

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Bennett: I read the letter to your Honor:

“Referring to that certain agreement dated January 29, 1937, wherein Pacific Portland Cement Company, a California corporation, is party of the first part, and Westvaco Chlorine Products Corporation, a Delaware corporation, is party of the second part, and which said agreement covers the sale of gypsum to Pacific Portland Cement Company, you are [186] hereby advised that the average cost of the production of gypsum by the undersigned, Westvaco Chlorine Products Corporation, for the twelve-month period commencing July 1, 1945, to June 30, 1946, was more than five per cent above its average cost of production for the preceding twelve-month period commencing on July 1, 1944, and ending on June 30, 1945. The actual advance in the cost of production of gypsum to Westvaco for the twelve-month period commencing July 1, 1945, and ending June 30, 1946, over the previous twelve-month period was eighty-six (86 cents) cents per ton.

Pursuant to the terms of Paragraph 6 of the agreement hereinabove referred to, you are hereby given sixty (60) days notice, in writing, that on the 13th day of November, 1946, the price to be charged you and the amount to be paid by you for

(Testimony of C. Bruce Flick.)

all gypsum delivered to you by the undersigned, pursuant to the terms of the said agreement hereinabove referred to will be at the rate of Four and 62/100 Dollars (\$4.62) per ton, payment to be made in the manner set out in said agreement.

You are further advised that said increase in price will be applicable only to the gypsum shipped to you and resold by you as a retardant in cement, and that the advance in price with respect to gypsum not resold by you as a retardant in cement will be suspended until price control [187] on such gypsum is terminated by the Office of Price Administration.

You are further advised that the books of account and records of the undersigned relating to its production cost of gypsum will be open to your inspection at all reasonable times.

Yours very truly,

Westvaco Chlorine Products  
Corp.,  
/s/ W. K. Wallace,  
Western Manager."

Mr. Bennett: Your Honor, it is a little after four o'clock. Does your Honor wish to keep going?

The Court: We will adjourn until tomorrow morning at ten a.m.

(An adjournment was thereupon taken until tomorrow, Thursday, December 11, 1947, at ten o'clock a.m.) [188]



Thursday, December 11, 1947, 10:00 o'clock a.m.

C. BRUCE FLICK,

recalled:

Direct Examination—(Resumed)

Mr. Bennett: Q. Yesterday you testified, Mr. Flick, on the 13th of September, 1946, after a conference with Mr. Wallace, and I believe at his suggestion, although my memory is not clear there, you sent to him two letters, one superseding the other?

A. Yes, I sent first a longer letter dated September 13th, and after discussion, after Mr. Wallace received it, that was revised to the shorter letter dated September 13th.

Q. Why was it revised?

A. Because Mr. Wallace did not agree entirely with the first of the two letters.

Mr. Bennett: I think without identification counsel will stipulate that this copy of a letter that I now offer in evidence is the first, and the longer of the two letters, is that agreeable?

Mr. Rosenberg: So stipulated.

The Court: It may be admitted and marked.

(The letter referred to was thereupon received in evidence and marked Plaintiff's Exhibit 11.)

(Testimony of C. Bruce Flick.)

PLAINTIFF'S EXHIBIT No. 11

Pacific Portland Cement Company  
417 Montgomery St., San Francisco 6, California

September 13, 1946

Westvaco Chlorine Products Corporation,  
Newark, California.

Attention: Mr. W. K. Wallace, Western Manager.

Gentlemen:

This letter is to record our understanding and agreement as follows:

(1) Sacking Gypsum

By letter dated June 23, 1945, from you to this company, accepted by us under date of June 30, 1945, the agreement between us for the sacking of gypsum by you for us was extended until July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement for sacking was further extended to August 31, 1946. You informed us that you discontinued production of gypsum on August 31, 1946, and that you have no interest in sacking small quantities. It is agreed that said agreement for sacking expired on August 31, 1946.

(2) Price of Gypsum

By letter dated July 25, 1945, from this company to you, and accepted by you, it was agreed between us that the price at which you would sell and we would buy gypsum until July 31, 1946, under our

(Testimony of C. Bruce Flick.)

contract of January 29, 1937, would be \$2.98 per ton and that the so-called escalator clause of said contract which contemplates change in the price from time to time should not be operative at any time before July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement of July 25, 1945, was further extended to September 4, 1946.

It is now agreed that effective September 4, 1946, the price at which you will sell and we shall buy gypsum until August 31, 1947, under our contract of January 29, 1937, shall be \$3.76 per ton for gypsum for cement retarder and \$2.98 per ton for gypsum for all other purposes and uses, and it is our intention to sell or use most of the gypsum received from you for cement retarder.

It is agreed, however, that at any time prior to August 31, 1947, whenever governmental laws or regulations permit a higher price than \$2.98 per ton for gypsum for purposes and uses other than cement retarder, you shall be entitled to charge such higher price, but not in excess of \$3.76 per ton.

(3) Deductions for Gypsum below specification

It is agreed that you have no claim against us for any deductions heretofore made in making payments to you for gypsum not within two per cent (2%) in gypsum content of, or not conforming to, the chemical analysis and specification which is a part of said contract of January 29, 1937.

(Testimony of C. Bruce Flick.)

- (4) Right to refuse in excess of 2,000 tons in any month.

According to paragraph (3) of said contract, we have asserted the right to refuse to purchase and accept in excess of twenty thousand (20,000) tons in any one calendar year, and in addition the right to refuse to purchase and accept in excess of two thousand (2,000) tons in any one month. Without waiving any of our rights under the agreement, we are willing to say to you that for any calendar year as to which we do not exercise our right to refuse to purchase and accept in excess of twenty thousand (20,000) tons, it is our intention and we fully expect to purchase your entire production for that year if offered to us in approximately equal monthly installments.

Please sign and return this letter to us to evidence our agreement, retaining the duplicate for your files.

Very truly yours,

PACIFIC PORTLAND CEMENT  
COMPANY,

By C. B. Flick, Vice-President.

Accepted and confirmed September . . , 1946.

WESTVACO CHLORINE PRODUCTS  
CORPORATION,

By W. K. Wallace, Western Manager.

Mr. Bennett: And the second letter, or the shorter letter that followed it, the revised letter, will be Exhibit 12.

(Testimony of C. Bruce Flick.)

(The letter referred to was thereupon received in evidence and marked Plaintiff's Exhibit 12.) [189]

(1) Sacking Gypsum

By letter dated June 23, 1945, from you to this company, accepted by us under date of June 30, 1945, the agreement between us for the sacking of gypsum by you for us was extended until July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement for sacking was further extended to August 31, 1946. You informed us that you discontinued production of gypsum on August 31, 1946, and that you have no interest in sacking small quantities. It is agreed that said agreement for sacking expired on August 31, 1946.

(2) Price of Gypsum

By letter dated July 25, 1945, from this company to you, and accepted by you, it was agreed between us that the price at which you would sell and we would buy gypsum until July 31, 1946, under our contract of January 29, 1937, would be \$2.98 per ton and that the so-called escalator clause of said contract which contemplates change in the price from time to time should not be operative at any time before July 31, 1946. By oral agreement between your Mr. W. K. Wallace and our Mr. C. B. Flick, this agreement of July 25, 1945, was further extended to September 4, 1946.



(Testimony of C. Bruce Flick.)

[Printer's Note]: The balance of Plaintiff's Exhibit No. 12, read into evidence at bottom of this page.

Mr. Bennett: I won't take time, your Honor, to read all the letters. They refer to another matter, but I will read the second letter, or Exhibit 12.

The Court: That is the revised letter?

Mr. Bennett: The revised letter.

Mr. Rosenberg: Sent on the same day.

Mr. Bennett: The same date, yes.

Mr. Rosenberg: The same day?

Mr. Bennett: Yes. Well, they are dated the same day, counsel. I do not know that they were actually sent on the same day. We can determine that from the witness, perhaps.

The Court: I think if you will read back the testimony already given, you will see that that has been asked and answered.

(Record read.)

Mr. Bennett: I will read three paragraphs, if your Honor please, beginning with the paragraph at the bottom of page 1 of Exhibit 12.

The Court: That is the revised letter?

Mr. Bennett: Yes, your Honor.

"It is now agreed that effective September 4, 1946, the price at which you will sell and we shall buy gypsum until November 13, 1946, under our contract of January 29, 1937, shall be \$3.76 per ton for gypsum for cement retarder and \$2.98 per ton for gypsum for all other purposes and uses,

(Testimony of C. Bruce Flick.)

and it is our intention to sell or use [190] most of the gypsum received from you for cement retarder.

It is agreed, however, that at any time prior to November 13, 1946, whenever governmental laws or regulations permit a higher price than \$2.98 per ton for gypsum for purposes and uses other than cement retarder, you shall be entitled to charge such higher price, but not in excess of \$3.76 per ton.

We reserve the right to question the use of this price of \$3.76 per ton as a base for any upward adjustment of the price in the future under the escalator clause. Our reasons for this lie in the questions which exist between us with respect to certain cost items claimed by you which have been discussed between us in the past and which we consider unsettled.

Please sign and return this letter to us to evidence our agreement, retaining the duplicate for your files."

Mr. Rosenberg: Mr. Bennett, isn't that from the longer of the two letters?

Mr. Bennett: No, this is the shorter.

The Court: This is the revised letter.

Mr. Bennett: Q. I will ask you, Mr. Flick, whether you ever received the acceptance of the proposals contained in this letter, namely, Plaintiff's Exhibit 12, by receipt of a copy of the letter with a form of acceptance executed by the defendant, or anyone representing the defendant? [191]

A. No, sir, I did not receive their acceptance of it. I received a letter denying it.

(Testimony of C. Bruce Flick.)

Q. You mean refusing to accept it?

A. Refusing it.

Q. When was it that you were first advised, and in what form, that the defendant would not accept the conditions or accept the proposals contained in your letter of September 13, 1946?

A. I was first advised that they would not accept it by a letter from Westvaco dated September 23, 1946.

Q. You have already testified that you had received in this period of time a third claimed price increase by the defendant. What was the date which you received the notice of that third price increase, Mr. Flick?

A. They gave us notice of the third price increase, as I recall it, by a letter dated September 13th, stating that in conformity with the 60-day notice provision in the contract the price would be increased effective November 13, 1946.

Mr. Bennett: That notice is contained, your Honor, in Plaintiff's Exhibit No. 10, which is already in evidence, introduced yesterday, and the new price claimed by the defendant was \$4.62 a ton at that time?

The Witness: Yes.

Mr. Bennett: Q. Since that time, Mr. Flick, they have reduced that claim by two further reductions, that is, they notified you that through error they included certain items that [192] they since have felt were not properly included?

A. Yes, they made corrections in their cost figures. There was one correction of 14 cents, and

(Testimony of C. Bruce Flick.)

there was another correction of 12 cents. The 12-cent correction was on the sulphuric acid charge, so that they made corrections aggregating 26 cents, which made the corrected price as claimed by them \$4.36.

Q. The last correction was made by them after this suit was filed? A. Correct.

Q. What, if anything, did you do with reference to any investigation of the basis for this additional or last-claimed increase, the third increase, which amounted to how many cents per ton claimed initially?

A. From \$3.76 to \$4.62 claimed initially.

Q. In other words, a third increase with 86 cents per ton claimed increase? A. Correct.

Q. Keeping in mind now, so your Honor will have the facts, the first increase in 1941 was a claimed increase of 18 cents. The second increase claimed in 1944 was what, Mr. Flick?

A. 78 cents.

Q. Additional to the 18 cents previously claimed, and the third claimed increase was how much? A. Originally 86 cents.

The Court: Q. And there was a reduction of 26? [193] A. 60 cents.

Mr. Bennett: Q. In other words, the three claim price increases total \$1.56, is that correct?

A. That is correct.

Q. And again, so that the record will be clear, the company paid without question this 18-cent increase at all times? A. Correct.

(Testimony of C. Bruce Flick.)

Q. At all times it offered to pay the 29 cents which was involved in the second price increase claimed of 78 cents, and which involved the total amount of the actual charges or costs which they claim, according to their books, were increased in the amount of 29 cents; in other words, you had up the time of the third increase agreed to pay an increase over the contract price of \$2.80 a ton, an additional 47 cents? A. Correct.

Q. Now, when this last claim, the third claim for a price increase on September 13, 1946, an additional 86 cents, was made, what, if anything, did you do to check into those claimed increased costs?

A. I sent Mr. L. O. Bannard, who was in the employ of Pacific Portland Cement Company, as our own auditor. I sent Mr. Bannard to Westvaco's office at Newark to look at their figures?

Q. And he, in turn, reported to you?

A. Mr. Bannard reported to me. After he examined the figures they gave him he came back and reported to me. Then Mr. [194] Bannard and I went down to Newark and had a discussion with Mr. Wallace and Dr. Seaton, who was out at that time, and we went over the figures, and the same questions that were discussed heretofore. Westvaco again maintained their position of their right to keep these accounts in accordance with their uniform accounting system, the right to treat them as joint products, or co-products, disregarding the fact that they were by-products.



(Testimony of C. Bruce Flick.)

Q. Is that what Mr. Wallace or Mr. Seaton said?

A. Mr. Wallace and Dr. Seaton have always maintained that position, that regardless of the fact that the product may be a by-product, under their uniform accounting system they treat it as if it is a joint product or a co-product. So we did not get very far in our discussion of the figures. We maintained the same position that we had heretofore. Dr. Seaton, however, did say that he would go into some of the questions raised, and it was as a result of that that the first correction of 14 cents was made, as we have already covered here. Then after the discussions which got nowhere, I wrote a letter on November 4th setting forth the differences between us, the items that we were willing to pay and the items that we questioned, and again offering to settle the differences by any reasonable means or any reasonable method.

Mr. Bennett: I think you have the letter of November 4th before you, Mr. Rosenberg?

Mr. Rosenberg: Yes. [195]

Mr. Bennett: I offer in evidence as Plaintiff's Exhibit 13, your Honor, the letter from Mr. Flick, of Pacific Portland Cement Company, dated November 4, 1946, to Westvaco Chlorine Products Corporation.

The Court: Admitted and marked.

(The document was marked Plaintiff's Exhibit 13 in evidence.)

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: May I see it just a moment?

Mr. Bennett: Do you want a copy of it?

Mr. Rosenberg: I think I have a copy.

Mr. Bennett: I will give you a copy.

Mr. Rosenberg: I just want to see, there was a typographical error in copying, and I want to see whether the same error is in there.

Mr. Bennett: Do you wish me to wait before reading this?

Mr. Rosenberg: No, that's all right.

Mr. Bennett: This letter, I think is important, your Honor. In reviewing and analyzing the situation it will be of aid to the Court, and I will read it in full:

“Pacific Portland Cement Company

417 Montgomery Street

San Francisco 6, California

November 4, 1946

“Westvaco Chlorine Products Corporation  
Newark, California.

Attention: Mr. W. K. Wallace, Western  
Manager

Gentlemen:

Subject: Westvaco Gypsum Contract [196]

“Your letter of September 13, 1946, referring to the agreement of January 29, 1937, between us, advised that

“The actual advance in the cost of production of gypsum to Westvaco for the twelve-month pe-

(Testimony of C. Bruce Flick.)

riod commencing July 1, 1945, and ending June 30, 1946, over the previous twelve-month period was eight-six (86c) cents per ton" and notified us that "on the 13th day of November, 1946, the price to be charged . . . for all gypsum delivered . . . pursuant to the terms of the said agreement hereinabove referred to will be at the rate of Four and 62/100 Dollars (\$4.62) per ton . . . applicable only to the gypsum shipped . . . and resold . . . as a retardant in cement."

Subsequently our Mr. L. O. Bannard has visited your Newark, California, office to inspect your books of account and records relating to the production cost of gypsum and has been furnished some information by your Mr. Wallace and Mr. Watt, but not all that he requested. We are unable to confirm correctness of the price advance of 86 cents per ton and question that much advance is correct. Items questioned by our auditor are as follows:

#### Operating Materials

Westvaco shows increase of \$.03 per ton, Pacific will [197] "accept increase of \$.02 per ton, questions \$.01 per ton, as it appears to have resulted from a change in accounting method for charges for low pressure air compressor, rather than an actual increase in cost of production.

#### Sulphuric Acid

Westvaco shows no charge in past periods, now charges \$.35 per ton. Pacific questions this as it does not appear that actual cost of production of

(Testimony of C. Bruce Flick.)

by-product gypsum has increased, but merely a change in bookkeeping methods has been made, and furthermore the adding of sulphuric acid in the manufacturing process benefits products other than gypsum.

### Bittern

Westvaco shows increase of \$.06 per ton, Pacific questions this as it appears to be due to a purely arbitrary bookkeeping increase rather than an actual increase in cost of production of gypsum, and Westvaco refused to show our auditor the computations.

### Direct Charges

Summarizing the charges classed by Westvaco as 'direct', Westvaco shows total increase of \$.62 per ton, Pacific will accept \$.20 per ton, and questions \$.42 per ton with respect to Operating Materials, Sulphuric Acid, and Bittern, as shown above.

Pacific furthermore questions the correctness of [198] Westvaco's accounting methods for by-product gypsum which allocates to the by-product, costs incurred prior to the point of separation of the by-product.

### Research

Westvaco shows an increase of \$.10 per ton for Research. Pacific questions this charge as it does not appear that Westvaco's research activities are actually a cost of producing by-product gypsum.

### Indirect Loading and Shipping Expense

Westvaco shows an increase of \$.02 per ton which Pacific questions as it appears to be due

(Testimony of C. Bruce Flick.)

to a change of bookkeeping methods and not an actual increase in cost of production of gypsum.

#### Overhead

Westvaco shows net increases aggregating \$.07 per ton, in sundry items comprising general overhead. Pacific questions the correctness of including certain of the items comprising this group, and also questions the correctness of the basis of prorating overhead as between by-product gypsum and other products produced.

#### Direct Loading and Shipping Expense

Westvaco shows an increase of \$.05 per ton which Pacific will accept.

#### Total Charges

Summarizing all of the foregoing, Westvaco shows an [199] increase of \$.86 per ton in cost of production of by-product gypsum, of which Pacific is willing to accept \$.25 and questions \$.61 per ton.

Furthermore, we question the use of the preceding price of \$3.76 per ton as a base for any upward adjustment of the price under the escalator clause. In our letter to you dated February 4, 1944, we stated that

“ ‘we question the correctness of the proposed price of \$3.76 per ton’

and in our letter of February 28, 1944, we stated that

“ ‘we question that the facts entitle you to the entire amount for which you have asked.’



(Testimony of C. Bruce Flick.)

In our letter of March 11, 1944, we stated

“‘When Dr. Seaton is here in April we shall negotiate the question of interpreting the term “Cost of Production” so that any and all questions shall be determined as a basis for adjusting prices in future in accordance with the contract, and to determine whether any price less than \$3.76 should be charged during 1944.’

Dr. Max Y. Seaton, Executive Vice-President, wrote to us on March 13, 1944:

“‘I will be very glad to discuss with you the development of more precise understandings regarding the meaning of the term “Cost of Production” which is included in our contract with you.’ [200]

“Such discussion took place on April 14, 1944, between Dr. M. Y. Seaton, Executive Vice-President, Mr. W. K. Wallace, Western Manager, and Mr. C. B. Flick. Mr. Flick expressed this company’s position that cost accounting methods satisfactory to Westvaco for its own purposes may result in incorrect charges to cost of production of by-product gypsum under the contract, especially in respect to allocating overhead. Dr. Seaton did not admit that any change in accounting methods should be made, and all questions discussed were left open and unsettled.

“The contract dated January 29, 1937, between Pacific Portland Cement Company and California Chemical Company—”

(Testimony of C. Bruce Flick.)

The contract in question—  
recites:

“ ‘Whereas California contemplates the erection of a plant located on Canal Head at Newark, California, primarily designed to produce magnesium oxide in its various forms, which plant will produce as a by-product substantial quantities of gypsum’ ”

and provides in paragraph (1)

“ ‘California agrees that it will sell and deliver to Pacific and Pacific agrees that it will purchase and receive from California, the entire output of by-product gypsum . . . (subject to the other provisions therein) [201]

“ ‘Paragraph (6) of the contract contains the ‘escalator’ clause under which the price may be increased in relationship to ‘California’s cost of production of gypsum’, ‘in an amount not to exceed the actual advance in California’s cost of manufacture.’ ”

Mr. Rosenberg: May I interrupt? I presume this letter is offered for the purpose of showing that Mr. Flick made objections to the price of \$3.75.

Mr. Bennett: Not only that—

Mr. Rosenberg: I am going to object to all of these self-serving and argumentative statements. I have no objection to the letter going in evidence to show the objections Mr. Flick made to our derivation of our increase in cost of production, but I

(Testimony of C. Bruce Flick.)

don't understand that it is going into the record as substantive evidence of the argumentative matter contained in the letter, or the accountant's arguments—

The Court: Just a moment. This is correspondence between the parties.

Mr. Rosenberg: That's right.

The Court: For what purpose is it offered?

Mr. Bennett: The purpose of the offer, your Honor, is to show the statements that were made by these parties, one to the other, during the course of time. One of the defenses they claim here is estoppel.

The Court: His objection goes to the language there used [202] as argumentative and what-not.

Mr. Bennett: I know, but, your Honor, that might be said of anything or everything we have done so far, that it is an argument. That is the essence of this case. We have to establish the controversy exists, the basis for the controversy, what was said by the parties with respect to that controversy, all that has to do with the matter that this court is going to construe. The court has received this sort of matter all along. There is another thing, interruptions in the midst of reading a letter of this kind that has been admitted without objection is extremely embarrassing to us, and I think it tends to deflect the court's attention from the subject-matter that is. It is relevant, and I assure your Honor I wouldn't be reading these things—I don't ask your Honor to accept my statement *ipsi dixit*

(Testimony of C. Bruce Flick.)

for it, but if there was not a definite purpose, a pre-thought-out purpose within proper limits of judicial procedure, a purpose that I am endeavoring to show—

The Court: Well, I can clear this up in just a moment. You have made an objection to it before. I overruled your objection, and it is subject to a motion to strike and over your objection.

Mr. Rosenberg: I don't think this is within the same category. My objection was to a letter antedating the execution of the contract. This is a letter written by Mr. Flick sometime, almost nine years after the contract. I assumed that it was [203] being offered for the purpose of showing the items to which Mr. Flick objected, and the basis of his objections. I have no objection to that. There is a lot of argumentative matter in here that I want to avoid.

The Court: Well, the jury is absent.

Mr. Rosenberg: That's right. I do not want it to be taken as evidence of the substantive facts.

The Court: Well, I may or may not take it. I told you the jury is not here.

Mr. Bennett: Counsel can argue this case, I think, at the appropriate time. It is not fair to interrupt. If he had objection to it he should have—

The Court: Go ahead with the reading of the letter.

Mr. Bennett: To bring your Honor back, Mr. Flick had been outlining certain provisions of the contract, and he had referred to the preliminary

(Testimony of C. Bruce Flick.)

provision stating that it was a by-product, and that California agreed to sell subject to the terms and conditions of the contract at a certain price the by-product. Then Mr. Flick's letter continues—this is an answer, as your Honor knows, to this claimed price increase:

“Paragraphs (6) of the contract contains the ‘escalator’ clause under which the price may be increased in relationship to ‘California’s cost of production of gypsum’, ‘in an amount not to exceed the actual advance in California’s cost in California’s cost of manufacture.’ [204]

“The contract does not contain any definition of the term ‘cost of production’ or ‘cost of manufacture.’ Since the contract deals with by-product gypsum it is apparent that the term ‘cost of production’ must be construed as ‘cost of production of by-product gypsum’ and the method of computing such cost should be the method which would be applicable as proper accounting practice for computing cost production of a by-product.

“In a letter dated June 5, 1936, Stanley H. Barrows, President of California Chemical Company, stated,

“‘Contract would contain certain price protection clauses to guard against increases in labor, fuel and supplies.’

“The first price increase claimed under the contract was an increase of 18c per ton, effective October 5, 1941, raising the price from \$2.80 to \$2.98 per ton loaded bulk on board cars at the Newark



(Testimony of C. Bruce Flick.)

plant. This was based on an increase in costs from \$1.66 per ton for July 1939—June 1940, to \$1.84 per ton for July 1940 to June 1941. Of the total increase of 18c per ton, labor, material and power accounted for 15c. Westvaco furnished month by month detail thereof. Since these direct charges accounted for such a large percentage of the total, Pacific accepted without question or detail the remaining net increase of 3c per ton merely because it was too small to warrant close [205] investigation.

“The figures furnished by you for the calendar year 1943 compared with the calendar year 1942 showed that direct costs charged to cost of production of gypsum increase \$.29 per ton, as follows:

	Per Ton		
	1942	1943	Increase
Labor operations.....	\$.26	\$.39	\$.13
Labor repairs.....	.12	.16	.04
Comp. Ins. and Soc. Sec. Taxes.....	.02	.03	.01
Material, operations.....	...	.02	.02
Material repairs.....	.06	.07	.01
Power .....	.15	.18	.03
Fuel .....	.10	.14	.04
Water .....	...	.01	.01
Total increase.....			\$0.29

“We are willing to accept this increase in direct cost of production of gypsum as the basis for increasing the price from \$2.98 to \$3.27. As previously stated, however, we question the following increases as we do not believe that they represent

(Testimony of C. Bruce Flick.)

an actual advance in your cost of manufacture of by-product gypsum. [206]

	Per Ton		
	1942	1943	Increase
Overhead .....	\$42	\$.82	\$.40
Taxes, Ins. & Deprec.....	.41	.49	.08
I. D. C.—water.....	.....	.01	.01
Total .....	\$.83	\$1.32	\$.49

“Loading and Shipping Expense was shown by you at \$.19 per ton in both years, so no increase was claimed on that account.

“We are ready, willing and anxious to pay you the amount that you are entitled to receive under the contract. You have notified us that the price will be \$4.62 per ton effective November 13, 1946. We are willing to pay \$3.52 per ton instead. It may very well be that you are entitled to the additional \$1.10 per ton, but in the absence of information which our auditor requested from you and which we consider necessary to determine the amount of increase in your cost of production, and pending further discussions with you as to the correct accounting methods to be followed in computing your cost of production of by-product gypsum we are unwilling to pay you any more than \$3.52 per ton.

“We shall be glad to discuss this with you at any time, and as stated in our letter of February 28, 1944, hereby renew our offer to take all reasonable steps to have any questions which might exist

(Testimony of C. Bruce Flick.)

between us determined by any reasonable method or in any reasonable manner. [207]

“Very truly yours,

Pacific Portland Cement  
Company

By C. B. Flick

Vice-President.”

The Court: We will take a recess.

(Recess.)

Q. (Mr. Bennett): Mr. Flick, referring again to your letter of November 4, 1946, which I have just read to His Honor, you mentioned the fact at the bottom of page 1 of that letter some information was furnished by Mr. Wallace and Mr. Watt, but not all that he requested Mr. Bannard. What was the information that you referred to as being requested but was not furnished?

Mr. Rosenberg: To which we will object on the ground it appears from the letter it was information requested by the auditor. If Mr. Flick made any request, or if he was present at the time the request was made, I would have no objection.

Q. (Mr. Bennett): Mr. Flick, I think you testified after Bannard had gone down there to seek information that both you and Bannard went back to the Newark plant and had a discussion with Mr. Wallace and perhaps others there, is that correct?

A. Yes. We had a conversation with Mr. Wallace and Dr. Seaton was present. He happened to be out here from the East at that time.

(Testimony of C. Bruce Flick.)

Q. Was anything said at that discussion by you or by Mr. Wallace or Dr. Seaton representing the defendant Westvaco with reference to any record or information that they had not furnished or would not furnish?

A. Yes, we discussed the question of information which they did not wish to furnish, declined to furnish. They had allocated— [208]

Q. Just pause there. I will next ask the question of you, What was the information that they had not furnished and refused to furnish?

A. The information which they refused to furnish was information having to do with the costs, tonnages, payrolls, in general any information of the plant or other departments or other products of the plant other than the byproduct gypsum. I might say the reason why we wanted a look at such information was because of allocations or pro-rates charged to gypsum, which naturally the auditor, Mr. Bannard, was unable to verify without seeing the figures which made up the allocation computation.

Q. Now, so that that matter is perfectly clear, do you mean an item—

Mr. Rosenberg: Let him tell us.

Q. (Mr. Bennett): All right. Unaided by counsel, will you illustrate what you mean by that?

A. For example, if an item is charged, let us say, 5 per cent to gypsum—

Q. 5 per cent of what? Do you mean overhead?

A. 5 per cent of an item. Let us take overhead.

(Testimony of C. Bruce Flick.)

Suppose you have overhead, of which 5 per cent is charged to gypsum on the theory that the payroll in the gypsum department is 5 per cent of the total plant payroll. Therefore the overhead should be allocated 5 per cent to gypsum.

Q. Just pause there. Do you mean that is your statement of [209] what should be done or their statement?

A. No, indeed. I am illustrating the kind of accounting practice Westvaco follows.

Q. You are speaking of what they claim was their procedure that they followed.

A. Yes, and I am using percentages here that are close to the actual, but I do not recall the precise percentages. I am trying to make a simple illustration. They allocate certain overhead items on the basis of a percentage of labor payroll. If the gypsum department labor payroll is 5 per cent of the labor payroll for the entire plant, then they will charge as cost of production of gypsum, 5 per cent of these overhead items which they elect to allocate on that basis, do you see?

Q. Yes.

A. An auditor who attempts to verify the correctness of the amount charged to the gypsum department, in order to tell whether the labor payroll for the gypsum department is in fact 5 per cent of the labor payroll for the entire plant, must look at the payroll for the entire plant. In order to tell whether the amount of overhead is allocated correctly, he must look at the total amount of the overhead. Or take another example: If you have a



(Testimony of C. Bruce Flick.)

shipping expense, which in past years they allocated on a tonnage basis, in order to tell whether the tonnage allocation was properly done, the auditor has to know not only the tonnage of gypsum shipped, but the tonnage of magnesium [210] oxide shipped, and if they refuse to show how many tons of magnesium oxide were shipped, he can't check the correctness of the percentage or the allocation.

Q. Does that same thing apply to whether any items that are claimed allocable to gypsum are properly allocable? For instance, if some item of charge, indirect or overhead, is allocated or claimed to be allocated to gypsum, does that necessity of checking the other records apply as in the illustration or instance you have made?

A. I have been talking only about checking an allocation without reference to the question of whether the item allocated on their books should be allocated on their books under good accounting or under the contract, but I am simply illustrating in order to check any allocations of whatever nature, an auditor has to see the whole picture in order to check percentage and check the amount allocated.

Q. That applies not only to checking the correctness of the amount but to determining whether the item allocated has any relation to the manufacture of gypsum, isn't that so?

A. In order to determine whether the amount allocated has any relation to the manufacture of gypsum, he has to know the nature of the thing that was allocated. Let me illustrate that by

(Testimony of C. Bruce Flick.)

perhaps bittern. That would be an example. They charged a certain amount to gypsum for bittern, admittedly on a purely arbitrary basis. The auditor was not given any information [211] as to the cost of the bittern or how much bittern was charged to other products or why the certain amount was charged to gypsum on account of bittern. Those are all questions of the amount charged for bittern. That is aside from the further question whether any bittern should be charged to gypsum.

Mr. Bennett: If Your Honor please, at this juncture and so that the Court will be able better to follow the significance of these points that have been discussed in the witness' testimony, I wish to read into the record a question in our interrogatories to the defendant and the defendant's answer to that interrogatory. I would like to interrupt the witness because it is a foundation matter upon which further questions will be asked. Mr. Kaapcke will read it.

Mr. Kaapcke: As an explanatory matter, I might say I will read one question and one answer. A similar question was asked for each accounting period and the same answer was given with respect to each accounting period, so we can cover the entire matter by repeating the one particular one.

The particular interrogatory I am reading is No. 4E:

“State in what particulars and to what extent each element of such cost contributed to or was related to the production of gypsum. State whether

(Testimony of C. Bruce Flick.)

each element would have been incurred if no gypsum had been produced.”

And the answer, being Answer 4E:

“None of the direct charges shown upon Exhibit A— [212] parenthetically there was an exhibit for each accounting period—none of the direct charges shown upon Exhibit A would have been incurred if no gypsum had been produced. Indirect charges shown on Exhibit A would have been incurred if no gypsum had been produced but in a lesser and unascertainable amount.”

To illustrate what the charges were referred to on the exhibit, the exhibit for each accounting period shows a statement of the defendant's classification of charges, and the one for Exhibit A that we are using as a typical example shows the following: “Labor operations, labor repairs, materials, operations, materials, repairs, power, gas, overhead and shipping expense.”

Mr. Bennett: Just so there is no question in the mind of the Court, I would like to summarize my understanding. I am not testifying now, but so that the Court will understand our purpose in offering this answer to the interrogatory, the defendant stated in answer to our question, “Which of the charges claimed by you would not have been incurred if you were not producing or manufacturing gypsum?” As Mr. Kaapcke read, the defendant answered that all of the direct charges, labor, materials, supplies, and so forth, listed on the exhibit appended to the answer to the interrogatories,

(Testimony of C. Bruce Flick.)

would not have occurred. They say that the other charges that were included in the category of overhead and indirect, and which they apportioned [213] by their bookkeeping method, the additional charge which they assert, which is the type of charge in dispute—they admit that even though gypsum was not manufactured, those charges would have gone on, but they say in a less but unascertainable amount. I think the significance of that will appear further by the witness' testimony and the testimony of other witnesses.

Q. As I understand it, then, in the absence of your right to see the books of the company, to verify the figures as to the accuracy of the arithmetic or allocation and also to determine whether any so-called indirect or overhead item is properly allocable to the cost of manufacture of gypsum, you would have to see those records, wouldn't you, or any accountant would have to see those records, isn't that your testimony?

A. Any accountant would have to see the complete records.

The Court: Let the Court inquire at this time of counsel. Were these books available to the defendants here at all times?

Mr. Rosenberg: I believe they were, Your Honor, with one exception: With reference to our records pertaining to our sales of products other than gypsum, which would naturally reveal how much we made, who we sold to, the price we got

(Testimony of C. Bruce Flick.)

for the product—those were not made available to them. I do not think that has any materiality.

The Court: Let me try to approach it in another way, then. How can you determine overhead costs unless the books are available? [214]

Mr. Rosenberg: The books were available to them for the purpose of determining our overhead costs. There is certainly no showing up to this point that the books were not available to them to show our overhead costs, with this possible exception, Your Honor: I believe the point Mr. Flick made is where we allocate overhead, by relating our direct gypsum cost to the total labor cost in the plant, naturally the total cost would be a factor in determining the propriety of that allocation. My understanding is Mr. Bannard, who is their accountant, when he went to the plant in 1946 for the purpose of checking the last price increase, did make a spot check of the total labor cost, and I believe also that this is a fact that they were told that we considered that those records which pertain to the production of other items, other than the gypsum, in which they were interested, were trade secrets. We did not like them going into the books and poring over those things that the corporation considers to be confidential information, but we would be willing to have an independent certified public accountant go in and certify to the correctness of the ultimate result.

Q. (The Court): Is that a fact?



(Testimony of C. Bruce Flick.)

A. I don't recall, at that time, the offer to have a certified public accountant check those things.

Mr. Bennett: I think that arose after the suit was filed and we made a motion to inspect the books. That was refused [215] before Your Honor. I would like to call Your Honor's attention to defendant's answer to plaintiff's interrogatory No. 11, wherein the defendant states that it would not permit any investigation or inquiry into the books showing cost to them of bittern so as to determine its allocation, if any allocation was proper, as against the cost of gypsum because that would disclose terms and conditions of a material contract between said supplier and defendant and inspection of such contract and the payments made thereunder would disclose all the products made by defendant, and the quantity sold. Disclosure thereof would require defendant also to reveal detailed information with reference to all products sold by defendant, including the identity and quantity of such products. Likewise, defendant has bittern contracts with other producers and the disclosure of the terms and conditions of its bittern contract with Leslie Salt Company might jeopardize the present and future relations of defendant with such other producers. Likewise defendant claims that its books, records and entries showing the bases for allocation of shipping expense likewise confidential and comprise trade secrets for the reason that disclosure of said information would reveal the products sold by defendant and the quantities and

(Testimony of C. Bruce Flick.)

selling price thereof. The general ledger which contains the entries above referred to are located in defendant's plant at Newark.

So there were other matters than bittern which the [216] defendant refused to disclose.

Mr. Rosenberg: Which answer was that?

Mr. Bennett: 11.

Mr. Rosenberg: You have not read the entire answer, have you, Mr. Bennett?

Mr. Bennett: What was that?

Mr. Rosenberg: I did not follow you very well. Were you skipping around?

Mr. Bennett: I paraphrased the question with relation to bittern and I read your reasons for excluding the defendants from looking at your expense records and the like. [217]

Q. (Mr. Bennett): Now, these payments that were made during this period of dispute pursuant to this letter of September 11, were they made under protest, Mr. Flick?

A. For the period from September 4, when the OPA decontrolled gypsum when used as a cement retarder, to the period November 13, 1946, we paid them \$3.76 a ton for the gypsum for use as cement retarder and for any other gypsum for any other use which was still subject to the OPA price control we paid them \$2.98 a ton and I don't believe that every check that we sent them was specifically protested, but we had certainly made our position clear both before and after that period. There was never any question.

(Testimony of C. Bruce Flick.)

The Court: Was that the money that had been paid into court?

Mr. Bennett: Both paid to the defendant under protest and also the monies paid into court.

The Court: Is there any question about that? If there isn't, you might enter into a stipulation concerning those facts.

Mr. Rosenberg: I was writing, Your Honor. What was that?

Mr. Bennett: The question is this: The payments that were made on any gypsum furnished on and after the 13th of September, 1946, to you were paid under protest.

Mr. Rosenberg: I don't believe that is true. I think the witness just said there was no protest accompanying all checks. [218]

The Court: From the period of the OPA.

The Witness: I said that the payment for gypsum delivered from September 4, when OPA price control went off, the gypsum as cement retarder from then until November 13, we paid \$3.76 a ton. Now, on payments, every check that went out from our accounting office may not have accompanied or been accompanied by a specific protest, but we had been making our position clear as to the \$3.76 price ever since January, 1944 and, as a matter of fact, to November 13, 1946.

Mr. Rosenberg: The payments that were made at the \$4.48 price, of course, were definitely made under protest. There is no question about that. As far as the money that is being paid into the court,

(Testimony of C. Bruce Flick.)

what they are doing is paying us the minimum amount that they concede that we are entitled to—

The Court: I wanted to have that established for the record. I thought it could be done without wasting any further time.

Mr. Bennett: I will offer in evidence, if Your Honor please, at this time and ask it be deemed read a letter dated December 11, 1946, a letter dated February 12, 1947, a letter dated January 10, 1947, and another letter dated December 17, 1946.

Mr. Rosenberg: May we see what you are offering in evidence?

Mr. Bennett: Yes. They are letters that were sent by us [219] for the plaintiff to the defendant.

Mr. Rosenberg: If you want to clutter up the record—I just stipulated referring to payments made at the \$4.48 price, they were paid under protest. Is that the purpose of those letters? I have no objection to them going in evidence.

Mr. Bennett: The letter of December 11 includes a protest for certain payments made on the \$3.76 price, on page 2, Mr. Rosenberg, and if we can either stipulate to that or introduce the letter in evidence, perhaps that would be the quickest way.

Mr. Rosenberg: What did you say they were paid—

Mr. Bennett: Payments that were made prior to the \$4.48 price.

Mr. Kaapeke: That was shipments through November 13. It was not until November 13 that your \$4.48 price became effective so that—

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Our price would be correct—well, I have no objection to the letter.

Mr. Bennett: Well, let's put the letter in as plaintiff's exhibit next in order.

(The letter in question was thereupon received in evidence and marked Plaintiff's Exhibit No. 14.)

Mr. Bennett: I will just read at this time the first paragraph. This is the letter dated December 11, 1946 addressed to Westvaco Chlorine Products Company signed by Pacific Portland Cement Company, C. B. Flick. [220]

“Gentlemen:

“Subject: Westvaco Gypsum Contract

“We hand you herewith our check No. 3957 for \$6748.29, as a payment on account of gypsum deliveries through November 12, 1946.”

Q. And that payment, Mr. Flick, was made on the basis of \$3.75 and according to and pursuant to the conditions of your letter of September 13, 1946, in evidence as Plaintiff's Exhibit 11, was it not?

A. Yes.

Q. “We also hand you herewith our check No. 3575 for \$5831.97, being payment on account of gypsum delivered November 13 to 30, 1946, both inclusive.”

That was the payment at the higher rate claimed and demanded by them?

A. Yes; the higher rate went into effect on No-



(Testimony of C. Bruce Flick.)

vember 13 and covered until the end of the month.

Q. "This payment, aggregating \$12,580.26, is being made to you with the understanding that it is without prejudice to the rights either of Westvaco or of Pacific Portland Cement Company and subject to adjustment when the correctness of the price has been finally determined. In this connection, we understand that our attorney, Mr. M. D. L. Fuller of Pillsbury, Madison & Sutro, has been and is discussing this matter and other open questions with your attorney, Mr. T. Bacigalupi of Bacigalupi, [221] Elkus & Salinger."

Now, Mr. Flick, I am going to ask you some questions about accounting practices based upon your training and experience as a certified public accountant and as an accountant and auditor aside from your general accounting practices, accountant and auditor for various and sundry businesses that you have had during the period shown by your previous testimony.

In a situation of this kind, involving a contract between a manufacturer and a purchaser where the contract provides for the sale of a byproduct and where the contract states a base price, a fixed price, subject, however, to an increase during any 12 month period as compared to the previous 12 month period of the costs of production of such byproduct whereby the seller is entitled to an increased price on the stated contract price where any actual increases or advances in the cost of manufacturing of a byproduct occurs, from an ac-

(Testimony of C. Bruce Flick.)

counting point of view and in accordance with good and acceptable accounting principles, what would be the character of the items of cost of manufacture that would be attributable to the byproduct, the cost of manufacture of the byproduct?

Mr. Rosenberg: Just a moment. I am going to object to that, particularly on the ground that is not a proper subject of expert testimony for the reason that there has been injected into the hypothetical question the condition that he is to render his opinion based upon this contract. [222]

Now, I submit that that is not a matter for an account to testify to, that is a matter for the Court to determine as a matter of law. If he wants to give any testimony—if Mr. Bennett is interested in any testimony from this witness as to the accounting principles applicable to and acceptable for determining cost of byproducts, or whatever he wants to call them, I have no objection to that, but when he asks the witness to tell this Court what this contract, what under this contract is to be included in cost of production, he is calling upon the witness to interpret the contract. That is the function of the Court, not the witness.

Mr. Bennett: Your Honor, I think the question is proper but to save time and avoid argument I will approach it from a different point of view. I do not, however, concede the soundness or validity of counsel's objection.

The Court: So there is no future difficulty about it, the accountant here could not possibly construe the contract requirements.

(Testimony of C. Bruce Flick.)

Mr. Bennett: I did not think the question called for a construction—

The Court: Well, I think it would be well to omit the language in relation to the contract.

Q. (Mr. Bennett): If the problem submitted to accountants is a matter of determining cost or setting up cost of manufacture or cost of production of a byproduct, what costs are to be [223] included according to accounting practice in such a situation?

Mr. Rosenberg: Just so we are clear on that point. What do you mean by “such a situation”? What do you mean by the reference in the question to “such a situation”?

Mr. Bennett: The situation I have just stated to the witness.

Mr. Rosenberg: You mean—let me understand the question—your question, as I understand it, you are asking him to tell you what according to good accounting practice are the items to be included in determining the cost of producing a byproduct?

Mr. Bennett: Yes.

Mr. Rosenberg: All right.

The Court: You may answer.

The Witness: Good accounting practice in accounting for the cost of production or cost of manufacture of any byproduct has several points.

In the first place, it is generally accepted accounting practice that no cost of any kind or description prior to the point of separation of the byproduct should be included.

(Testimony of C. Bruce Flick.)

The next point is that where the byproduct requires no processing to put it into marketable condition, it is customary practice simply to credit against the cost of the main product the sales proceeds of the byproduct. I will give an illustration. For example, suppose you had oyster shells, an oyster company that shucks the oysters and their main purpose [224] is to get the oyster and as byproduct they have the shells. They may be able to sell the shells to people who would like to come to the place and haul them away. They can get so much for the shells without doing anything to them. Good accounting practice in that kind of a situation would call for simply crediting the proceeds of the shells against the cost of the main product. It is simply just really, you might say, velvet from a waste that comes in incidentally and whatever they can get for it is just income.

The other type of byproduct is a byproduct needing processing. It hasn't any value until they have done something to it to put it in marketable or saleable shape. For example, I don't know whether I am permitted to mention the byproduct gypsum—

Q. Yes, I think the Court will permit you to.

A. If I could use the byproduct as an example—  
The Court: Proceed.

A. Dr. Seaton wrote a magazine article which has been referred to previously here in which he described the byproduct gypsum. He said in his magazine article gypsum would be a valueless waste if it were not for the favorable location for many

(Testimony of C. Bruce Flick.)

products which enable them to get money out of it. A by product which is a valueless waste and which requires something to be done to it to put it into such shape as to give it value, there you have the problem of the cost of production or cost of manufacture of the byproduct and in such a situation—there are [225] many such situations—in such a situation the cost of producing or cost of manufacture means just those direct things that you have got to do to that product to put it in marketable shape to give it some market value.

In the case of the byproduct, gypsum as it comes off the filters there, you have got to dry it and grind it in order to give it this market value. In the case of such a byproduct the items which are properly includable as a cost of manufacture or cost of production of the byproduct are the items which you have charged to the particular product, which you have to spend in order to put it into shape so that you can get something for it.

That is the general broad principle, generally accepted good accounting practice in connection with byproduct accounting. There is a further principle in all accounting that is applicable in any circumstance and that is the accounting to be good practice, good accounting practice, should be consistent from year to year and particularly if you have a situation where the purpose of the accounting is to compare any twelve months with any preceding twelve months, it is essential to good accounting practice that the same accounting method



(Testimony of C. Bruce Flick.)

and practice and procedure be followed in one period as were followed in the other period, otherwise the comparison will not yield a correct accounting result.

Q. In such a situation, state whether or not overhead, indirect [226] or other items than these direct or actual costs of manufacturing the gypsum, according to good accounting practices, should be considered as part of the cost of manufacture.

A. Well, we have got to consider our terms. We have got to consider what we are concerned with. What you are asking me now is cost of manufacture or cost of production.

Q. Yes.

A. Now, there are lots of overhead charges which are not cost of manufacture or cost of production and an illustration of that might be, well, let's say the salary of the president of the company is not really considered a cost of manufacture because he is a general and administrative officer. The salary of the secretary and treasurer, a general and administrative man, the accountants make a general distinction between overhead items which are of a general and administrative character. Those items are not cost of manufacture or cost of production any more than is selling expense a cost of manufacture or cost of production. Overhead items which are not an actual out of pocket cost of putting this waste material into a form where you can sell it for something are not properly chargeable as cost of manufacture or cost of production.

(Testimony of C. Bruce Flick.)

Q. Will you state for the benefit of the Court what costs or what items are those that may be, according to accounting procedure, included among the cost of production, cost of manufacture of a by-product? [227]

A. Well, typical items which you would be out of pocket, which you would incur in order to put this waste material into a form which gives it market value, would be the direct labor which operates the necessary machinery to process this material, the labor to keep that machinery in repair and maintain it, the power to drive the machinery, the fuel oil or natural gas to heat where you have a drying problem. The lubricating oil and greases, or what we commonly call operating supplies for a particular machinery, those are typical items. Those are typical items which are required, you would have to spend that money to put that waste into a form which has some value so that you can get something for it.

Q. Is there a difference or distinction in accounting practice for the inclusion of items of cost between the manufacture of a byproduct and a principal or a co-product?

A. There is a very definite difference recognized by good accounting practice. In the accounting for a major product, the accounting for several co-products, or you might say several major products—another term for co-product is joint product. There is a very definite difference in accounting practice for joint products and co-products and

(Testimony of C. Bruce Flick.)

the accounting practice for byproducts. I might illustrate that by reference to the Pacific Portland Cement Company which has a gypsum plant out in Nevada. We produce agricultural gypsum. We produce gypsum for sale to cement companies as cement retarder. [228] We produce hard wall plaster. We ship some of it down to the Redwood City plant to make it into gypsum wallboard. The different forms in which that gypsum is produced at our plant among the other products, those are what you would call joint products or co-products. They are all, you might say, of equal importance. They are all major products. We bring the rock down from the quarry to make the different products from it. We don't get any byproducts at Gerlach.

Q. At Gerlach gypsum is a principal operation?

A. That is what the plant was primarily designed to produce, was gypsum products, each one of which is equally important. As an example of petty byproducts, at our Gold Hill, Oregon plant, there are dust collectors in connection with the stacks and they collect excess cement dust that otherwise would go up in the stacks and blow out over the countryside and people would complain about it. This dust that is collected in those dust collectors, a certain amount of it accumulates in the yard there in piles and then some of the farmers come along and they say, "I would like to come in and get a couple of truckloads of this cement dust, put it on my farm." So we let them come in and get it and they pay us a small price for it.

(Testimony of C. Bruce Flick.)

Q. In your accounting system do you charge any cost of manufacture against that byproduct?

A. None in that case.

The Court: The difficulty there with this latest comparison about this byproduct, it is dust and is not a commercial—you would not consider that a commercial byproduct, would you?

The Witness: Anything is commercial that you can sell for money.

The Court: You said you sold it to people—

The Witness: You don't get much for it.

The Court: Where, on the other hand, gypsum, you do.

The Witness: Yes. I am just trying to illustrate—

The Court: Yes, I understand. I did not want to interrupt.

Mr. Bennett: I wish you would interrupt any time.

The Court: If I did, I am afraid I would annoy all of you.

(Discussion as to future progress of the case, and recess taken until 2:00 o'clock p.m.) [230]

Thursday, December 11, 1947, 2:00 o'clock p.m.

C. BRUCE FLICK

resume the stand.

Direct Examination (Continued)

Q. (Mr. Bennett): Now, to give you a hypothetical case, Mr. Flick, take the case of a peach

(Testimony of C. Bruce Flick.)

canner in a situation where the principal product is the canning of peaches and incidental to that operation there results or is produced in the canning operation the pit or a stone out of a peach. If those pits are considered a byproduct and are sold without any further processing, in accordance with good accounting practices, what would be considered the cost of production of the peach pit?

Mr. Rosenberg: To which I object on the ground it is incompetent, irrelevant and immaterial. It has no possible analogy to the case where you have to go through processing and a refining process where you have—

Mr. Bennett: Well, I am coming to that. This is preliminary, Your Honor.

Mr. Rosenberg: Well, he has already testified to that.

Mr. Bennett: What do you mean by that, counsel?

Mr. Rosenberg: He has already said that under those circumstances you merely credit the sales price of the byproduct and treat it as a reduction of the cost of the main product.

Mr. Bennett: Thank you.

Q. In that hypothetical situation that I gave you, if the byproduct [231] peach pits were ground up and molded in the form of a brick or brickettes and those bricks or brickettes were sold under a contract or otherwise, what would, according to proper accounting practice and understanding, be the cost of production or manufacture of those brickettes?



(Testimony of C. Bruce Flick.)

A. That is a typical example of a byproduct. It requires further processing to put it in a form where it has some value to make it sell. The cost of production of the byproduct would be considered to be the direct and out of pocket cost necessarily incurred to put those peach pits in such form that they would have some marketable value.

Q. You mean by that what?

A. And only the direct cost of that, a machine to grind up and compress them into brickettes. You would have the cost for the operator of the machine; you would have the cost of the power to run the machine, the compressing and the cost of repairing those machines and maintaining them and the cost of lubricating oil and grease or any other supplies incident to operating the machine; the cost of shipping the brickettes, if you want to include the shipping those costs which you are out of pocket to put that product into a form which gives it some market value.

We had, if I may refer to two typical examples in my own experience, the Hawaiian Pineapple Company in Honolulu which has, I believe, the largest fruit cannery in the world, when [232] they reamed the shell from the pineapple, those pineapple shells were conveyed away and dumped in an oven, dried out thoroughly and then ground up, and they are sold as pineapple bran. That is a typical byproduct. They don't grow the fruit on the plantations in order to get the pineapple hulls. They grow the fruit in order to get the canned pine-

(Testimony of C. Bruce Flick.)

apple and canned pineapple juice, but incident to that they get this waste material which they can process and sell as a pineapple bran. The treatment of the cost of production of that byproduct was to charge the cost of that little bran unit where the hulls were dried and ground and packed into sacks and shipped.

Another typical example, in the same cannery, use was made of the waste mill juice of the pineapple; it perhaps was dirty or for one reason or another could not be canned and sold as drinkable juice. This waste mill juice was conveyed off to a little citric acid department and there it was chemically refined to get the citric acid. It came out in crystals, it come in a white powder form finally that was sold to the drug trade.

There again is a typical byproduct which requires some further processing to put it into a form where it has marketable value. In both of those cases the charges which were made to the cost of those products were the charges of those particular units where those byproducts were processed after they had been separated out from the main product.

Q. Were any of the indirect items considered as cost of [233] production or cost of manufacture of those articles, either the end waste of the shells of the pineapple or the citric acid?

A. We charged only the charges which could be very directly ascertained to be due to the operation of those particular byproducts at the time, the charges which were out of pocket expenses for put-

(Testimony of C. Bruce Flick.)

ting that byproduct material into a form where we could sell it. We did not make general allocations of overhead.

Q. Is that in accordance with your understanding of the proper accounting practice understanding of the term "cost of production"?

A. Very definitely.

Q. Would direct charges which would not have been incurred if the byproduct had not been produced be considered in accordance with good accounting practice a part of the cost of manufacture of such byproduct?

Mr. Rosenberg: What hypothesis are you assuming?

Mr. Bennett: I am assuming the abstract because you did not want me to talk about this contract.

Mr. Rosenberg: You have mentioned a number of times——

Mr. Bennett: I am talking about the answer in your interrogatories. You said in answer to interrogatory 10-G, "None of the direct charges shown in Exhibit F," namely, the direct charges for labor and actual production of the byproduct, the drying and grinding and delivery to the plaintiff, "would have [234] been incurred if no gypsum had been produced." In those direct charges you assessed or claimed against the plaintiff here, which the plaintiff has agreed at all times to allow as cost, increased cost, as the evidence has shown, you said in answer to the interrogatory that none of those

(Testimony of C. Bruce Flick.)

charges would have been incurred if no gypsum had been produced. My question to the witness is whether those charges which would not have been incurred if the byproduct had not been produced are the charges for the cost of the production or manufacture of the byproduct.

The Witness: The direct charges which are necessary to put the byproduct into form giving it marketable value, those charges that would not have been incurred if the byproduct had not been produced are very definitely the cost of production of the byproduct.

Mr. Bennett: Now, I refer, counsel, for your information, to the same answer in the interrogatory which reads—which are all the other charges that you have asserted as a part of your cost of production—“indirect charges shown on Exhibit F that would have been incurred if no gypsum had been produced but in lesser and unascertainable amount.”

Q. Now, I will ask you, Mr. Flick, whether according to accounting practice and understanding, indirect charges which would have been incurred if no gypsum had been produced but in lesser and unascertainable amounts would be cost of manufacture [235] or production and treated as such.

A. In good accounting practice for a byproduct one should not charge to the cost of manufacture of the byproduct indirect or overhead charges which would have been incurred regardless of whether or not any of the byproduct was produced and one

(Testimony of C. Bruce Flick.)

should not charge as a cost of production of the byproduct any amounts of indirect or overhead charges which are unascertainable.

Q. Now, I direct your attention to Exhibit F of the Defendant's answers to Plaintiff's interrogatories.

Mr. Rosenberg: Are you placing it in evidence?

Mr. Bennett: Well, I think I am entitled, Your Honor, to treat the answers to these interrogatories as an admission of a party and admissions are always evidence and certainly can be used for the purpose of allowing an answer to a question.

Mr. Rosenberg: If the witness is going to be interrogated, I ask that the exhibit as to which he is being interrogated be made a part of the record.

Mr. Bennett: Counsel, I don't have to do that. I am not going to introduce a lot of self-serving declarations that you have made in these answers to interrogatories as a part of the plaintiff's case, but I think it goes without saying, Your Honor, that where the parties pursuant to the rules of procedure have filed in this court answers to the various and sundry interrogatories that have been filed that I can refer in [236] interrogating a witness to an answer, particularly where it pertains here merely to a list of items which obviously are a list of items that the defendant has revealed by other evidence in the case given by this witness, the various charges and alleged costs that make up the total cost that they are claiming for the production and manufacture of the gypsum.



(Testimony of C. Bruce Flick.)

The Court: His objection goes — what is this document? What is this document you are reading from?

Mr. Bennett: I am about to show the witness Exhibit F that the defendants filed in this Court as a part of their answer to the interrogatories which the plaintiff propounded.

The Court: The objection will be overruled.

Q. (Mr. Bennett): Mr. Flick, I hand you herewith a copy, or I show you herewith a copy of Exhibit F appended to the reply of the defendant to interrogatories propounded to defendant by plaintiff. I will hand Your Honor a copy just for such reference——

The Court: I am in doubt about going into interrogatories, as to what degree we should go into them. They speak for themselves. They are a part of the record in the case. Are you familiar with these interrogatories?

The Witness: Yes, sir, I have seen them.

The Court: You might indicate for the purpose of the record so we will have a proper record, the purpose of this offer.

Mr. Bennett: I am not offering it, Your Honor, as [237] evidence. I am merely showing it to the witness, the particular document, the particular list, Exhibit F that the defendants have filed here in answer to interrogatory lists the items of cost for two periods; first, the period July 1, 1944 to June 30, 1945, and the period July 1, 1945 to June 30, 1946 upon which the defendants claim their third

(Testimony of C. Bruce Flick.)

increase over their list. For example, Your Honor, it shows claim for supervision, labor, operation, labor and repairs, materials, bittern water, power, gas, fuel oil, sulphuric acid, overhead.

The Court: Proceed.

Mr. Bennett: I don't think those matters are in dispute because the witness has already testified about these matters and it seems to me a convenient matter of reference; the defendant has admitted by filing this document that these were the items of cost that they included in their claim for an increase.

Q. Directing your attention to the words and figures in sub-paragraph (b), Mr. Flick, beginning with the word "supervision" over to the right, "allocation," will you state whether or not according to accounting practices and understanding, that is a cost of production of the byproduct gypsum.

Mr. Rosenberg: Just a moment. Before the witness answers I want to renew my objection. I am speaking of the record, if the Court please. Just contemplate the record in this case. He is showing him an exhibit, a written document, then he is [238] asking him a question relating to the document and the witness is going to come up with some answer. If it becomes necessary to read this record, no one can tell from the record what document, what is contained in the document as to which this witness is giving the testimony. I think before the witness is asked a question of that kind, the document should be made part of the record and the only

(Testimony of C. Bruce Flick.)

way it can be a part of the record is by being offered as such. I think if somebody was to read this record it wouldn't be an intelligible record, it could not possibly be where a witness is interrogated regarding a document that no one reading the record can tell what is contained in the document.

The Court: For the purpose of identifying the document and what we are talking about, the record should disclose it if it has not already done so.

Mr. Bennett: I will ask that the answers to the interrogatories of the defendant be marked for identification, if that is necessary, or I would limit it and suggest it this way, Your Honor. It is not necessary, but if counsel sees any conceivable purpose that this exhibit F to the answer should be marked for identification—I want to point out the wholly specious nature of this thing. Counsel knows exactly what these things are. If there is any incorrection of the words or figures used by the witness, it can be corrected at the time. Defendant was the one who offered it, Your Honor. The record is not going to [239] be hurt. There is not going to be any confusion by using some document that the defendants have furnished, officially furnished pursuant to the rule requiring them to do so.

What counsel wants me to do, I submit it is a trick practice, he wants me to offer in evidence and thereby be bound by all these self-serving declarations that are contained in his answers to interrogatories and I am not going to do it and I should not be required to do that.

(Testimony of C. Bruce Flick.)

The Court: It would be well to ponder a moment. All these communications that traveled between the parties, there are so many of them, they are argumentative. I allowed it as I do in most cases, I allow the widest latitude so we can get at the merits, but you are offering the contents of these interrogatories on file.

Mr. Bennett: Exhibit F, Your Honor, the defendant's interrogatories, I offer that F now for identification. I am not offering it in evidence because the only purpose it serves now is for a preliminary question to this witness.

The Court: Well, after the preliminary question where are we going?

Mr. Bennett: The matter will be clear. I will tell you what I want to do.

The Court: Pardon me. It is my thought that if you are going to interrogate him on this document, or a part of it and limit it and possibly direct your examination going into the [240] contents of it according to that limitation.

Mr. Bennett: I will do it. I will offer Exhibit F as the next exhibit in evidence for the plaintiff as representing the items and the basis for the claim that such items according to defendant's contention constitute items of cost of the manufacture or cost of production of gypsum because that is all it is.

The Court: Let it be admitted and marked for that purpose.

(Testimony of C. Bruce Flick.)

(The document in question was marked Plaintiff's Exhibit No. 15 in evidence.)

## PLAINTIFF'S EXHIBIT No. 15

	July 1, 1944	July 1, 1945
10.	June 30, 1945	June 30, 1946
(a)	\$2.52	\$3.24
(b) Supervision (5)	.04	.04 Allocated
Labor-Operations	.32	.35 Actual time card dist.
Labor-Repairs	.21	.25 Actual time card dist.
Materials-Operations	.02	.05 S'room req. & Direct Purch.
Materials-Repairs	.11	.20 S'room req. & Direct Purch.
Bittern (1)	.18	.16 Arbitrary Allocation
Water	.02	.02 At cost—measured
Power	.14	.14 At cost—measured
Gas	.10	.11 At cost—measured
Fuel Oil	----	.01 At cost—measured
Sulphuric Acid	----	.35 At cost—measured
Overhead (2)	.74	.88 Allocated—labor basis
Taxes, Ins.,		
Depr. (3)	42	.39 Allocated—% roughly based on Plant value
Inter-departmental charges	.01	.01 At cost
Ship. Expense (4)	.21	.28 Actual cost plus pro-rate Misc. Ship. Exp.
(c) (1) Gypsum	.18	.16 per ton
Bromine	12.75	13.29 per ton
Magnesia	.72	.73 per ton
(2) Gypsum	6.3%	7.8%
Service Accounts	1.9%	3.1%
Lime	8.9%	9.4%
Ethylene Dibromide	12.8%	6.3%
Magnesia	70.1%	73.4%
(3) Gypsum	9.0%	9.6%
Service Accounts	4.1%	3.6%
Lime	26.3%	26.8%
Ethylene Dibromide	12.5%	10.1%
Magnesia	48.1%	49.9%
(4) Gypsum	24.0%	46.7%



(Testimony of C. Bruce Flick.)

	July 1, 1944	July 1, 1945
10.	June 30, 1945	June 30, 1946
Ethlyne Dibro-		
mide	4.0%	0.5%
Lime	6.4%	4.5%
Magnesia	65.6%	48.3%
(5) Gypsum	18.8%	26.0%
Ethylene Dibro-		
mide	2.3%	1.1%
Lime	6.3%	6.0%
Magnesia	72.6%	66.9%

Mr. Bennett: I might say parenthetically these items are already in the record in another form. I am merely using it as a method of comparison, thinking it would be less objectionable.

Your Honor also stated, and Your Honor will please forgive me if what I am about to say is in any sense a critical statement, but Your Honor said you allowed a great deal of hearsay here. I think Your Honor also qualified that by another inclusion, all that the witness testified to in these letters and memoranda was not hearsay, it was expressions between the parties and it is not hearsay when both sides are present and they are discussing something.

The Court: I wish I was blessed with the finality that some of you attorneys who come in here have. I have my own [241] failings. What I intended to say was argumentative.

Mr. Bennett: That is correct in this——

The Court: 50 per cent.

Mr. Bennett: This evidence was involved because of one side stating its position and the other stating its position.

(Testimony of C. Bruce Flick.)

The Court: It would be a good argument before the jury.

Mr. Bennett: And I think Your Honor will also find it is a pretty good argument before this Court because after all Your Honor is to decide the question on the interpretation and what both parties were saying is a matter that Your Honor can consider. I don't say Your Honor is necessarily bound by everything that was said, but I agree that Your Honor's ruling would be quite right and quite within the proper realm of evidence and I am sorry that I have even prolonged the trial here by the comments I have made.

Q. Directing your attention again, Mr. Flick, to Exhibit 15, wherein the items or claimed items of cost asserted by the defendant are set forth, I direct your attention to the item, "Supervision." State whether or not, in accordance with good accounting understanding and practice that is an item of cost of the manufacture or production of the by-product gypsum.

A. Supervision of a general nature, which the plant would have anyhow, if it did not produce the by-product gypsum, and which the plant was not able to ascertain how much of it is due to the production of the by-product, is not a part of the actual cost of the manufacture of a by-product under good accounting principles.

Q. Take next the item, "Labor operations." By the way, let us go back to the first one. I notice opposite the word "Supervision," there is for the

(Testimony of C. Bruce Flick.)

first period 4 cents and for the second period, comparative period, namely, from July 1, 1945 to June 30, 1946, 4 cents is again set up, showing no increase, and the word opposite is the word "Allocated." According to good accounting practice what does that mean to you?

A. What does the word "allocated" mean?

Q. Yes.

A. The word "allocated" signifies that the actual amount was not ascertained, and some portion of it was charged on some computation basis.

Q. And you would not consider that from an accounting point [244] of view cost of manufacture?

A. I do not consider that that would be cost of manufacture for the purpose of good by-product accounting.

Q. Take the next item, "Labor operations," which showed for the first period July 1, 1944 to June 30, 1945 32 cents per ton, and in the second period, July 1, 1945 to June 30, 1946, 35 cents, the words, "Actual time card dist."—what is that?

A. I take for granted that means "Distribution."

Q. State whether that would constitute a cost of production or cost of manufacture of the by-product gypsum?

A. The labor employed in the actual operation of the machinery which dries, grinds and ships this by-product gypsum, as ascertained to be due to that (and that is the meaning of the words, "actual time

(Testimony of C. Bruce Flick.)

card distribution) is correctly charged. There is no question about the correctness of charging that to cost of manufacture.

Q. When you discussed this matter with the defendants down in Newark, you accepted that charge, did you not?

A. Yes, we have not questioned any direct charge.

Q. To speed the matter along, I will ask you the same questions I have asked before, as to the items of supervision and labor operations as to the remaining items of paragraph B of this Exhibit F.

A. Do you mean you would like me to go down the line and comment on each one? [245]

Q. That is right.

A. Labor repairs, actual time card distribution, under good by-product accounting practice, the labor actually engaged in repairing the machinery used in processing the by-product, drying, grinding and shipping this gypsum, is chargeable to the cost of the manufacture of the by-product gypsum.

Q. And you understand that particular charge to be such a case, do you?

A. Yes, the words "actual time card distribution" signify to me that they actually kept track of the men's time, so that the men who worked on that, repairing that by-product processing machinery, their time was actually ascertained and was charged.

Q. And you accepted their representation as to that, did you?

(Testimony of C. Bruce Flick.)

A. Yes, there is no question about that.

Q. Take the next item.

A. Materials operations. There appears opposite that, "S'Rm." And I assume that means "Storeroom"; the letters, "Req.," I assume mean requisitions; and "Direct Purch." I assume means purchases. In other words, I take it for granted that that means, "Storeroom requisitions and direct purchases."

Now, that "Materials operations" charged on the basis of storeroom requisitions and direct purchases, under good by-product accounting practice, where you have to use certain materials in operating the machinery which processes your [246] by-product, and you charge the actual materials which you pull out of your storeroom for the purpose, and you charge them at the actual cost, and then you may have other materials which you may buy directly which do not come from the storeroom, and you charge those at the actual cost, that is properly chargeable to the cost of manufacture of the by-product.

Q. Go ahead.

A. The next item is materials repairs, storeroom requisitions and direct purchases, and there again where that is material which is actually used in the repairing of machinery which processes the by-product and it is charged, it is ascertained, it is kept track of so it represents the actual material used in the repair, is withdrawn from our storeroom or brought directly and used without going through



(Testimony of C. Bruce Flick.)

the storeroom, that is properly chargeable to the cost of the manufacture of the by-product. There is no question about that.

Q. So those two items you were willing to accept and concede with the defendants, were you?

A. There is no question in the principle. I believe there was a 1-cent difference there, which Mr. Bannard pointed out, but that is petty. We do not need to talk about that now, and it does not involve the principle I just enumerated.

Q. With the exception of that 1-cent difference, where, as I understand it, you contended that they had 1 cent more than they were entitled to for those two direct claimed items, [247] Materials Operations and Materials Repairs, you were willing to accept in the first case, Materials Operations, a 3-cent or a 2-cent increase, as the actual fact shows, and this next item, Materials Repairs, the 9 cents claimed increase you were also willing to accept?

A. There is no question about the Materials Repairs. I think the materials operations was the item in which we had a 1-cent difference. There was a change in accounting method for an air compressor. That does not affect the principle in charging materials, as I have stated it.

Q. In that particular illustration what did you find? That there was an actual 3-cent increase, or only a 2-cent increase?

A. 2-cent.

Q. In other words, the figure 5 cents in the right-hand column should have been 4, is that correct?

A. Yes.

(Testimony of C. Bruce Flick.)

Q. Take the next item, Bittern.

A. No part of the bittern is properly chargeable as a cost of production of the by-product, because the bittern is the raw material which comes into the plant for the manufacture of the major product, and the general principle, commonly accepted by good accountants for by-product accounting, is not to charge the by-product material with anything prior to the point when the by-product is separated out, because, as I have stated, the cost of actually putting that waste material into a form [248] which gives it market value is the cost which is chargeable.

Q. Just pause there for a minute, and let us take that hypothetical situation of the manufacture and sale of these briquets made out of by-product, the pit of the peach by a fruit canner. Would the proper accounting practice to allocate to the cost of the manufacture or the cost of production of that briquet any part of the cost of the peach that comes from the farmer?

A. It would not. I mentioned the case of the pineapple cannery, which is also in point. We did not charge the cost of the bran or the cost of the citric acid with any part of the cost of the pineapples which were grown for the purpose of making canned pineapple.

Q. Take the next item, Water.

A. "Water at cost measured." Now, if you have water which is actually necessary in the processing of this by-product gypsum, after the point of sep-

(Testimony of C. Bruce Flick.)

aration, and you have kept track of the actual water; you have measured it; you have ascertained, there is no question about that being properly chargeable as a cost of manufacture of a by-product.

Power likewise. You have to use power to run your machinery to process this by-product and put it in marketable condition, and if you keep track of your power and ascertain actually what the cost of it was—it says here at cost measured—that is properly chargeable as cost of manufacture of the by-product. [249]

Q. In that particular case there was no claimed increase for power for that second period?

A. No, these particular figures are the same for both periods.

Q. Take the next item, Gas, wherein there is a 1-cent claimed increase.

A. Gas, again. It says "at cost measured." Now, that means, or if we assume that that means that the gas actually used in the drying of the gypsum was actually measured and ascertained to be of this amount of cost, that is a direct charge. There is no question about that being properly chargeable to the cost of production of the by-product gypsum.

Q. What about fuel oil? Would you say the same thing?

A. Fuel oil is the same as gas. The same principle applies. There is no question about that.

Q. Now we come to the item Sulphuric acid, which for the period July 1, 1944 to June 30 1945 there is no cost shown, but for the next annual

(Testimony of C. Bruce Flick.)

period it is shown to be 35 cents per ton at cost measured. What would you say about that item?

A. Sulphuric acid, which is added to the bittern, is not something which is necessary in the processing of the by-product after the point of separation, and sulphuric acid, therefore, under the principle that we have stated, would not be chargeable to the cost of manufacture of the by-product.

Now, there is another phase involved in the sulphuric acid [250] charge, and that is that we are dealing with two accounting periods of 12 months, and it is basic in good accounting practice that you should not change your accounting methods from one period of twelve months to the next period of twelve months if you are going to have to base something on a comparison of the two.

Q. In other words, there are two reasons why you would exclude sulphuric acid from being a cost of producing or manufacture of gypsum?

A. That is correct. There might also be a third reason, but that involves chemistry, and if I am permitted to state my understanding of it I will state it, and that is the sulphuric acid, as Dr. Seaton stated in his article, which we have referred to previously, the sulphuric acid was added because the bittern had a slight and variable alkalinity which made its processing difficult. Now, therefore, if you are primarily producing a major product and you add this material to make the processing, to facilitate the processing for the major product, again it should not be charged as the cost of manufacture of the by-product.

(Testimony of C. Bruce Flick.)

Q. It is your understanding, is it not—and I do not think there is any dispute on this—the total cost of all the sulphuric acid that was added, as counsel says, to this bittern is charged or sought to be charged for this last period, July 1, 1945 to June 30, 1946, against the by-product gypsum, is [251] that not correct?

A. That is my understanding.

Q. Let us turn to the next item, a big one, Overhead.

The Court: Go back to that last question and answer. Read it, Mr. Reporter?

(Record read.)

The Court: Proceed.

Mr. Bennett: Does that answer your Honor's inquiry?

The Court: Yes.

Mr. Bennett: In other words, prior to that time they charged the sulphuric acid to other products. Mr. Flick pointed out Dr. Seaton, of the defendants, stated the sulphuric acid was necessary to condition this bittern so they could manufacture magnesium oxide, the principle product, and the witness has stated that that is a third reason why sulphuric acid should not be charged to the by-product gypsum.

Mr. Rosenberg: I am not going by my silence to be taken to have agreed with your very cavalier statement. The fact of the matter is prior to this time the bromine plant had been continuously in operation and the sulphuric acid was necessary to



(Testimony of C. Bruce Flick.)

the production of bromine. Prior to 1945, for that reason, all the sulphuric acid was charged to the bromine plant. In 1945, for good and sufficient reasons, the production of bromine was discontinued. Therefore, there was no preceding product to which the sulphuric acid could be charged. [252] I do not want it to be understood as conceding that this was just an arbitrary change in accounting practice. It was not. Furthermore, I do not know that the court has read Dr. Seaton's article. I doubt very much that there is any statement made in that article that sulphuric acid was necessary for the production of magnesium. That has been an assumption that has been indulged in throughout the testimony. I call it to Mr. Bennett's attention.

Mr. Bennett: I still stand on exactly what I said and what this witness said, and if you want to go into that it can be demonstrated beyond a question of doubt. Counsel has seen fit to inject this thought into it. I want to clear it up and put it at rest: This is what Dr. Seaton said in describing the necessary steps in the manufacture of magnesium oxide, and I read from the article which is in evidence, if your Honor please, and I read from page 640:

“Raw bittern has a slight variable alkalinity which makes its further processing difficult. Accordingly, from the storage ponds it is pumped to a large surge tank, from which it issues as a controlled stream into which the necessary quantity of concentrated sulphuric acid, to give essential neutrality, is introduced by a proportioning pump. The

(Testimony of C. Bruce Flick.)

flow then passes to concrete reservoirs which hold several days' plant supplies. From these reservoirs the neutral bittern—the neutral bittern after the sulphuric [253] acid is added—is pumped to an elevated supply tank."

And then he goes on and discusses the process of manufacture. There will also be evidence on this, as I understand, from both the defendant and the plaintiff, your Honor. I simply attempted to summarize—perhaps that was unnecessary—the three separate and distinct points, any one of which this witness said were according to good accounting practice.

Mr. Rosenberg: May I just call the court's attention to the fact that the paragraph that counsel read from this article was taken from Dr. Seaton's dissertation upon the recovery of bromine from bittern? That is exactly the point I made to the court, that the sulphuric acid certainly is necessary to the production of bromine, and during the time that bromine was being made it was charged to bromine. Of course, this article was written back in 1931, which is six years before this plant was even constructed. But I do not want the article misquoted.

The Court: We will now proceed to the overhead, which is the next item, gentlemen.

Q. (Mr. Bennett): What would you say about that, Mr. Flick, whether or not, according to good accounting practice and accounting understanding, overhead should or should not be included in the

(Testimony of C. Bruce Flick.)

cost of production, or the cost of manufacture of the by-product gypsum?

A. Well, I read "Overhead allocated labor basis." First of all [254] under good accounting practice for a by-product you should charge the cost of production of the by-product with the actual out-of-pocket expense which you are put to in order to get that by-product into such form that it has marketable value. You should not charge the cost of manufacture of the by-product with overhead, which you would have even if you discontinued the manufacture of the by-product, and the amount of which you cannot definitely ascertain as necessary to put the by-product in its marketable condition. It is not good accounting practice to allocate overhead to a by-product, where the amount is not ascertainable.

Q. Are there any other reasons?

A. I think that pretty well covers it.

The Court: There is an interesting item now coming up, Taxes, in which there was a reduction from 1944 to 1945. What about that item?

Mr. Bennett: Which is that, your Honor?

The Court: The next item of Taxes.

The Witness: "Taxes, Ins."—I think it means insurance—and I believe "Depr." means depreciation, and I read opposite that, "Allocated percent roughly based on plant value."

The Court: There was a reduction in taxes. That is what I was interested in.

Mr. Bennett: Your Honor, I might comment at

(Testimony of C. Bruce Flick.)

this time we do not get any benefit of the reduction of cost. Is only [255] where the costs go up.

The Court: Looking at this, I was rather taken by surprise because there was a reduction of taxes. Proceed now, gentlemen.

Mr. Rosenberg: That is another statement that is not true. You certainly do get the benefit of the reductions to the extent that they reduce increases.

Mr. Bennett: Well, we are getting perhaps into a side point.

The Court: Proceed.

The Witness: The question of taxes depends, first of all, upon what taxes we are talking about: Social Security taxes, which are directly due to the labor payroll which you have, would be in your by-product department, where you process this by-product material; the Social Security taxes applicable to those workmen who are directly employed there—such taxes are chargeable to the cost of production of the by-product. There is no question about that, in my mind. Then you may have property taxes, and property taxes generally are assessed on an entire plant, and there is no definite ascertainable charge for the property taxes on the machinery that is used in drying and grinding your by-product.

The Court: "Plant value," it says here.

The Witness: It says, "Roughly based upon plant values allocated." Where you cannot ascertain the amount, in my opinion, you should not charge the cost of manufacture of a by-product.

(Testimony of C. Bruce Flick.)

You have other forms of taxes, such as corporation franchise taxes, which very definitely would not be a cost of [256] manufacture. We are concerned with cost of manufacture and not with general administrative costs, or selling costs, or anything of that sort, the cost of doing business. Well, a corporation franchise tax might be of that nature. Any taxes of that sort are not chargeable. In fact, your property taxes do not arise directly out of the manufacture of the by-product. They are assessed by an outside governmental agency, and the tax rates are fixed by things that have nothing whatever to do with the manufacture of the by-product.

The item "Insurance": There, again, we do not know what type of insurance we are talking about, but in general Workmen's Compensation Insurance, which applies to the men who work in the processing of the by-product is chargeable as a cost of manufacture of the by-product. But when you get into some other forms of insurance, maybe the company has use and occupancy insurance to protect itself in the event the plant is stopped by fire from producing, or if you have insurance which is purely of a financial protection nature, that is not cost of manufacture of a by-product. If you discontinue the by-product you may have insurance anyway, and the amount of the insurance allocable to the by-product may be unascertainable.

Q. Going back for a minute to overhead, where-in they set forth for the first period 74 cents and in the second period 88 cents, assuming that those



(Testimony of C. Bruce Flick.)

charges, or that item, or the charges that are included in the general term "Overhead" would have been incurred [257] if no gypsum had been produced, but in lesser and unascertainable amounts, would any of them be, according to good accounting practice and understanding, included as cost of production, or cost of manufacture of the by-product?

A. In my opinion they would not be chargeable properly as cost of manufacture of the by-product. Any item that you would have anyhow, even if you quit making the by-product, or which you could not ascertain the amount of it chargeable to the by-product, should not be charged to the cost of manufacture of the by-product. For example, included in this overhead is an item of New Products Research.

Q. (The Court): Where did you get that?

A. From our previous examination of the figures.

Q. I see.

A. We know that that is part of it. By no stretch of the imagination, in my opinion, is New Products Research properly chargeable as a cost of manufacture of the by-product. You do not have to research on new products in order to dry, grind, and ship the by-product. It is just unrelated. It is not chargeable under any type of good accounting practice.

Q. (Mr. Bennett): Is it good accounting practice and in accordance with your understanding of accounting practice to allocate any indirect cost,

(Testimony of C. Bruce Flick.)

aside from any other consideration on a basis of labor comparisons, that is, the cost of labor involved in the direct manufacture of the by-product as against [258] cost of labor for the major or primary or over-all operation, excepting the manufacture of the by-product?

A. I think that I have already stated that it is not good accounting practice to charge to the cost of manufacture of a by-product overhead items where you can't ascertain the amount that is chargeable, and you would have the overhead anyway if you quit making the product. Your present question is directed to the basis of allocation. Now, I have already said I do not think they ought to be allocated, but if, under some system of accounting, a company chooses for its own purpose to try to allocate to its by-product charges which it is not able to ascertain belong to the by-product, if they want to allocate, why, then, they should try to find a basis of allocation which is logical and related in some manner.

Now, to take an arbitrary labor basis, it has the convenience of uniformity. It is the procurustean bed, if you like. It makes everything fit—the percentage of labor, whether labor has anything to do with it. For example, if you allocate laboratory research on a payroll basis, there is no possible relation between the two.

Q. In addition, Mr. Flick, to those reasons, I am going to ask you this: In the case of a by-product where you are concerned with determining

(Testimony of C. Bruce Flick.)

the cost of manufacture or the cost of production of that by-product, where another cost is involved, not only the convenience of the manufacturer, himself, but where [259] someone else would be affected by the correct determination of cost of production, state whether or not, according to good accounting practices, any indirect items should be considered or classed as a cost of production or manufacture of the by-product?

Mr. Rosenberg: I want to be sure if I understand that question. You are asking him now whether the same good accounting practices would apply where somebody else is affected as where you, yourself, only are affected? Is that the question?

Mr. Bennett: No, I think the question speaks for itself, unless the Court has some inquiry.

The Court: If there is any question about it reframe the question.

Mr. Bennett: Q. You have spoken of the matter of accounting, whether it be good accounting practice or not, for a manufacturer to set up any system of allocation. If the object of the accounting system was to determine not only for the convenience of uniformity or otherwise of the manufacturer, himself, but where there is a purpose to determine, say as in this case, the amounts of any price increase that a buyer of the by-product would have to pay, dependent upon any actual increase or advance in the cost of manufacture, state whether or not in accordance with good accounting

(Testimony of C. Bruce Flick.)

practice indirect items are considered as cost of manufacture? [260]

Mr. Rosenberg: I will object to that on the ground it is complex, compound, unintelligible, incompetent, irrelevant and immaterial, and calls for the opinion and conclusion of the witness on a question of law; whether or not under the circumstances of this case indirect costs are properly includable in the cost of production of gypsum is a question of law for the Court to determine, according to the contract that the parties entered into.

Mr. Bennett: I have the greatest respect for this Court. Your Honor knows that. But your Honor may be a certified public accountant; I am not, and this is merely a question calling upon this witness, an admitted expert, for what the accounting practice is. I am not asking him to decide this case. Your Honor is. But he, being a witness here, is certainly qualified to express an opinion. If your Honor does not believe him, of course you can disregard it. But he is entitled to express an opinion in this case as to whether or not, where some interest is concerned, where the purpose of the accounting in this particular situation has to do with keeping the actual cost of production or manufacture in mind, this witness is qualified to testify as an expert, and that is all I have asked him. He is not indulging in any conclusion of law. He is talking about what is accounting practice, according to his understanding.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Obviously the only relevancy that that could have would be to determine whether or not, or help the [261] Court to determine whether or not in this case it is proper or is not proper to include indirect costs by reason of the fact that Pacific will be affected. I submit, therefore, the question as to whether or not it is proper to include direct costs in this particular instance, because Pacific will be affected, is to be determined by the Court in view of the contract that Pacific entered into, and it is not for this witness or any other expert witness to say whether or not the fact that Pacific is going to be affected is to change the accounting practice. That is a question of law, I submit, for the Court to decide.

The Court: The phrase, "Indirect charge" has been used repeatedly here.

Q. It has been your testimony thus far, as far as your testimony goes, that the only proper tax or charge, rather, is to the gypsum, itself, because it is a by-product. Am I correct? You may correct me if I am in error.

A. The gypsum is a by-product.

Q. Yes.

A. Good by-product accounting charges to the cost of production of the by-product, No. 1, nothing prior to the point when it is separated out; No. 2, those direct charges which are out-of-pocket expense and necessary to put that by-product material in such shape that it is worth something. In the case of this gypsum you have to dry it, you



(Testimony of C. Bruce Flick.)

have to grind it, and you have to ship [262] it.

Q. I understand you have indicated that that is a proper charge.

A. That is perfectly proper.

Q. I understand.

A. Now we come to the indirect or overhead charges. Those charges, those overhead charges which you would have anyway, whether you processed the material or whether you pumped it into the bay, those charges which you cannot directly ascertain were caused by this processing of by-product, those charges are not properly chargeable.

The Court: I think that clears up the situation. It is time for a recess in any event.

(Recess.) [263]

Mr. Bennett: Q. Mr. Flick, I wish, going back to this item of overhead or indirect items, you would again review to the Court whether or not according to good accounting practice and understanding, those items are to be included in the cost of manufacture of by-products and the reasons, if any, why they should be included or not included.

Mr. Rosenberg: To which I object, if the Court please, on the ground it has been asked and answered not once but three or four times, and incidentally, I asked the Reporter to give me a transcription of the witness' last answer to the last question and I got it, and counsel got it, and if this is an attempt now to alter his testimony, I am going to object to it and I submit the question has been asked and answered half a dozen times.

(Testimony of C. Bruce Flick.)

The Court: Well, it won't be answered again. I will allow it now, in order to clear up the whole situation. You may answer.

The Witness: The question was whether overhead and indirect items should be charged to the cost of manufacture of a by-product. Is that the question?

Mr. Bennett: That is the question.

The Witness: The answer to that question is that good accounting practice as a general principle does not charge overhead and indirect items to the cost of manufacture of a by-product, and in addition to that, where you have other items [264] which, as I said, you would have them anyway, whether you produce a by-product or waste the material, and you have other items which you can not ascertain that they are directly necessary to the process of a by-product; items of that kind are not chargeable to a by-product.

Q. Thank you, Mr. Flick. Now, turning to the last item of the last—I don't think you said anything about depreciation. You mentioned taxes and insurance. Any depreciation, Mr. Flick?

A. Depreciation. Opposite depreciation I see that it says "allocated per cent roughly based on plant value."

Now, in accounting for a by-product, the only depreciation which would be properly chargeable to the cost of manufacture of the by-product would be depreciation on the machinery and equipment actually used to process a by-product to put it in

(Testimony of C. Bruce Flick.)

condition to market it. It would not be good accounting practice to prorate and charge to the by-product a part of a general plant or equipment used for processing prior to the point of separation. To go into by-product accounting, you have the problem in depreciation of the method used for depreciation. A straight-line method of depreciation, for example, would not be correct because you would write off the cost of a machine at a fixed amount per annum over the number of years you expect to use it and it should be written off on a production basis of so much per ton, or a fixed amount per ton instead of having a [265] fluctuating amount per ton because the tonnage fluctuates.

You have also the question of the depreciation upon a fixed percentage, which would be correct for a company using it but not correct if the company were trying to ascertain the cost of production of a by-product or somebody else might be involved. I am thinking of this type of thing. We have, for example, in Pacific Portland Cement Company a plant built for the production of gypsum wall-board. That plant was built under a wartime certification of necessity and the government issued a certificate of necessity which permitted the company to write that plant off over a five year period, and the plant was written off over a five year period, so it is completely written off the books. But it is still there and still operating. It was good accounting practice to write that plant off over a five year period for its own purpose, but it would

(Testimony of C. Bruce Flick.)

not have been good accounting practice if somebody else might have been involved in it. So on depreciation you have got the depreciation on a production basis for just what machinery which is used in the processing of the by-product itself, after its point of separation.

Q. You would be willing, then, to concede in this case that depreciation on that basis should be included among the charges or the costs.

A. I think so, because that would be correct accounting practice. [266]

Q. How much in a case where depreciation is allocated on some basis, generally allocated on some system, you mentioned the five year period, and the special situation with the wallboard plant. State whether or not that would be a proper basis.

Mr. Rosenberg: To which I will object on the ground the proper foundation has not been laid for that. There is no showing here there was any 20 percent a year depreciation on the basis of the wallboard plant.

Mr. Bennett: I did not say it was the same. I said allocated on any basis. For example—well, to save time, I will withdraw the question. I don't want to argue about these matters.

Q. Would any plan of cost accounting that allocated depreciation without reference to the specific factors that you mentioned as being the proper basis for figuring depreciation be in accordance with good accounting practice?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: To which I will object on the ground there is no foundation. The statement which has been presented to that witness shows that the depreciation is allocated on the basis of the plant value and that obviously means the gypsum plant value as related to the entire plant.

Mr. Bennett: I thought my question was even broader and more beneficial to you than that, but I will narrow it. Would it be proper in accordance with good accounting practice, to allocate depreciation on a percentage, roughly, basis on plant [267] value?

A. I assume that it means that they take the depreciation for the whole plant and they figure the value for the whole plant and then figure the value of the by-product plant and, let us say, the value of the by-product plant is, say, 10 percent of the value of the whole plant, then they charge the by-product cost with 10 percent of the depreciation of the whole plant. That sort of thing, in my opinion, would be incorrect accounting for the cost of manufacture of a by-product. There are two more items on this list: there is an interdepartmental charge—

Q. Go ahead.

A. That is when a charge is directly ascertained to be due to the processing of the by-product. That would be properly a cost of manufacture of the by-product. The item of shipping expense opposite it, it says, "actual cost plus pro rate of miscellaneous shipping expense." There again there would be properly chargeable a cost of shipping



(Testimony of C. Bruce Flick.)

the by-product, whatever actual direct labor is. If you had one man with a Fuller-Kinyon pump getting the gypsum out of the storage bin into the freight cars, that actual expense of labor would be chargeable to the cost of shipping the by-product, but any pro rata of indirect or miscellaneous shipping expense would not be good accounting for the by-product.

Q. While these figures can be ascertained arithmetically, I wonder if you can advise us now, Mr. Flick, according to your [268] own computation, the amount of money which you have paid to the defendant which is in dispute, that is, which you have protested and for which the plaintiff claims recovery here. Perhaps we can stipulate to this because it is a matter that really is not in dispute.

The Court: Let it go in subject to correct.

Mr. Kaapcke: I will state the situation this way: Since the plaintiff began paying the rate of \$3.76 a ton and up to the time when this suit was filed, certain amounts of gypsum were paid for; they were delivered and paid for. In order to determine how much refund we might be entitled to once the correct price had been determined, we want to get those tonnages in the record. I will read into the record the tonnages subject to verification. They are willing to stipulate to those tonnages subject to verification.

The Court: Very well.

Mr. Kaapcke: In September there was a payment of 953.5 tons at \$3.76. In October there was

(Testimony of C. Bruce Flick.)

a payment for 2339.43 tons also at \$3.76. In November there was a payment for 1798.08 tons at \$3.76. In November there was also a payment for 1656.81 tons at \$4.48. December there was payment for 2691.49 tons at \$4.48. In January, 1947, there was payment for 2851.01 tons at the price of \$4.48. Ensuing payments have been made into the registry of the Court under an order of the Court and speak for themselves. [269]

Mr. Bennett: You may cross examine.

#### Cross Examination

Mr. Rosenberg: Q. Will you enumerate the products that Pacific Portland Cement makes?

Mr. Bennett: We object to that as incompetent, irrelevant and immaterial.

Mr. Rosenberg: The witness has repeatedly said, he has repeatedly used his experience in the Pacific Portland Cement Company and their methods of accounting, to illustrate the expert opinion that he has expressed. I think we are entitled to go into the background upon which those opinions were based.

The Court: Overruled.

A. The Pacific Portland Cement Company has no by-products.

Mr. Rosenberg: I did not ask that. I asked you the question, what products do they make?

Mr. Bennett: Counsel has interrupted me on a number of times and in a manner that was rude and ungentlemanly and I do not think counsel

(Testimony of C. Bruce Flick.)

should interrupt a witness with a snarl and a growl. That is not decent conduct and I object to it.

The Court: Proceed orderly, gentlemen.

Mr. Rosenberg: Your Honor, I have permitted the witness to ramble on direct examination.

Mr. Bennett: Oh, you have not permitted anything.

The Court: Proceed. Reframe your question.

Mr. Rosenberg: Q. Will you tell me what products Pacific [270] Portland Cement makes; will you tell me what products they make, whether they are main products or by-products?

A. Pacific Portland Cement Company makes Portland cement, it makes gypsum products, agricultural gypsum, gypsum used as cement retarder, hardwall plaster which is made from gypsum, makes gypsum wallboard. It sells limerock, it sells shell flour, agricultural lime, shell meal, fertilizer, mixed fertilizer. I think that is about it.

Q. When you mentioned gypsum products, what do those embrace?

Mr. Bennett: He has already said—

The Court: You will have to speak more loudly for the Reporter.

Mr. Rosenberg: Q. You mentioned gypsum gypsum products. What does that embrace?

A. Gypsum products include agricultural gypsum, gypsum as cement retarder, hard wall plaster, two or three other items of plaster that I have

(Testimony of C. Bruce Flick.)

not mentioned but they are minor, and gypsum wallboard.

Q. Is each of those products the result of a separate process or do some of them come off production lines that contribute to the production of two or more products?

Mr. Bennett: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. You are speaking now only as to gypsum products? [271]

Mr. Rosenberg: Q. Any of your products.

A. I would describe our products as products very definitely of the type of general product or co-products. We have no by-products.

Q. Now, I will ask you the same question again. Do you have any products that you make where the processing is joint up to a point and then there is a separation and the material at the point of separation is separately processed from that point on?

Mr. Bennett: I suppose, your Honor, I need not restate the objections that I wish to make to these questions.

The Court: Overruled.

The Witness: A. You have, for example, gypsum. Gypsum rock is quarried out of a quarry at Gerlach, Nevada. All of the subsequent gypsum products are derived, let us say, from the rock which comes from the quarry, so when the rock is blasted out of the quarry and transported down

(Testimony of C. Bruce Flick.)

from this quarry you have one basic raw material from which you make the gypsum products which I have mentioned. Those are all joint products or co-products.

Mr. Rosenberg: Q. I will ask you the same question the third time. Do you have any products that are taken off your production line at a point and from that point on are separately processed?

A. I think I just answered that. The rock that comes from the quarry is— [272]

Q. Let's get the rock from the quarry. You have that in your plant. A. Yes.

Q. You start using some of it.

A. The first thing you do with the rock is crush it up.

Q. Then what do you do?

A. That depends on what you are going to make out of it from there on.

Q. If you are going to make wallboard, what do you do?

A. If you are going to make wallboard, you crush it up fine and then you calcine it in kettles and make what is called stucco. You drive off some of the moisture in the calcining process. The gypsum we take from the quarry is calcium sulphate with two molecules of water, in chemical combination with it. Even out in a Nevada desert it has a little bit of moisture chemically combined with it, the calcium sulphate, and you calcine it in these kettles and drive off a little bit of this chemically combined water to produce what you call stucco.



(Testimony of C. Bruce Flick.)

Then you ship that stucco to the wallboard plant and make wallboard out of it. [273]

Q. Do you take that crushed gypsum and use it for wallboard or do you use that for some of your other gypsum products, too?

A. You could take the same crushed gypsum, without calcining it, crush it to the desired fineness, put it in 100 pound paper sacks and sell it as agricultural gypsum. I am not betraying any trade secrets. These are commonly known facts.

Mr. Bennett: Thank you, counsel.

The Witness: Agricultural gypsum is simply ground up gypsum which is in its natural state. It is just ground up gypsum, that is all.

Mr. Rosenberg: Q. Is there any other product that you make that you process this ground gypsum in order to arrive at your finished product, other than wallboard?

A. Well, we have hard wall plaster, for example.

Q. Yes.

A. You can take stucco after it has been calcined and you can add some chemicals and you can add—sometimes they have used animal hair or some other type of binder material, depending on the kind of plaster they are making, and make plaster that is used in buildings, homes and offices.

Q. So that if I understand you correctly, you can take this crushed gypsum, and depending upon the product that you want to make, you process it

(Testimony of C. Bruce Flick.)

one way for wallboard and you process it another way for plaster, is that right?

A. That is correct, or you need not process it at all. [274]

Q. Or you can use it for agricultural gypsum?

A. Sure.

Q. In keeping your cost accounts at Pacific, Mr. Flick, what do you do as to this crushing process? Do you keep accurate cost records for your various products?

A. We keep cost records for our products on whatever basis seems to us convenient and desirable for our own corporate purposes. We do not at the present time have a contract which affects other people as to the manner in which we keep our costs. When we did have, we kept a special account for that contract.

Q. Now, may I ask you the same question again? Do you keep cost accounts for your various accounts? A. Certainly.

Q. You do. Now, how do you treat this crushing process as between wallboard and plaster? How do you charge that?

Mr. Bennett: I submit, your Honor, that is purely immaterial. It has no relation to the questions here.

The Court: It may or may not have. I will allow it. The objection will be overruled. You may answer.

The Witness: How do we treat the cost of crushing the rock from the quarry?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Q. Yes.

A. We charge the cost of crushing against an account for rock.

Q. Then what do you do with it? How do you decide how much it [275] costs to crush the rock that went into wallboard and how much it costs to crush the rock that went into plaster?

Mr. Bennett: If the Court please, I want to point this out to the Court: Counsel is now dealing with an operation which is not a by-product operation. It is an operation up in Nevada that has to do with only one purpose, the manufacture of gypsum. It is obviously immaterial how they keep their accounts for that particular operation. The question here is what accounts should be kept where a by-product is involved.

The Court: Well, too, we also got into the realm of joint products and co-products.

Mr. Bennett: This witness has testified all their products, and his evidence so far shows there is nothing like a by-product that they manufacture in connection with gypsum. He has also shown the Court that there is a distinct difference between cost accounting for a by-product and cost accounting for a main product or a co-product. In other words, they manufacture gypsum. They take that gypsum and by one process they make wallboard out of it and they also sack it and sell that for agricultural purposes, and they also use it in the manufacture of cement. There is nothing at all so far shown by this witness to be in any sense com-

(Testimony of C. Bruce Flick.)

parable or analogous to this situation of a by-product.

The Court: I allowed you the widest latitude. I am going to do the same with the other side. [276]

(Question read by the Reporter.)

A. All of the rock that is crushed is charged for the cost of crushing.

Mr. Rosenberg: Q. Of what?

A. The cost of crushing, so that no matter whether a ton of rock is used for one purpose or another purpose, if that ton of rock has come from the quarry and has been crushed, it is charged with the crushing costs.

Q. In other words, you do not get into your cost of producing wallboard, for instance, the cost of crushing the gypsum that goes into the wallboard. A. Certainly you do.

Q. How do you get it in there?

A. You start out with the rock in the quarry which you are going to use in one of four purposes: You do not know up to that time what you are going to use it for, so it goes through the crushing. You find out then you have a cost per ton of crushed rock. Now, you can use that rock for any one of four purposes, and you charge it to whatever account you use it for at its crushed cost.

Q. You add the crushing to the cost of the rock, is that it? A. That is right, sure.

Q. In arriving at your ultimate cost of your various products, do you include overhead?

A. You have to define what you mean by overhead. [277]

(Testimony of C. Bruce Flick.)

Q. Well, you have been using the term. I will let you define it. How do you define it?

A. Well, I will say in the first place that we operate—we are talking now about a gypsum plant at Gerlach, Nevada, and we are talking about products which I have stated are joint products or co-products. They are not by-products, and the accounting method that we use is correct for joint products or co-products.

Mr. Rosenberg: If your Honor please—

The Witness: I had to make that explanation because any accountant has a different basis for accounting for joint products than he has for accounting for by-products. You are getting me to describe my accounting methods for joint products.

Mr. Rosenberg: Q. Mr. Flick, I do not know whether you know what my purpose is. I am just asking you to answer a simple question and that is whether or not in determining your costs of the various items that you manufacture, do you include overhead?

A. We include—I don't know what you mean by overhead yet, but I will say it this way:

Q. Now, wait a minute. I will withdraw the question. Will you define for me the term "overhead" as you have been using it in your testimony?

A. I have been using it in my testimony as defined in the Westvaco accounts. [278]

Q. To include what?



(Testimony of C. Bruce Flick.)

A. It happens some items of overhead are considered as overhead by Westvaco which are not considered as overhead by Pacific.

Q. Oh, no. I am talking about the testimony that you gave as an expert when you were talking about pineapples and peach seeds, and you said that overhead would not be included in the cost of production of those articles. I am asking you now to define overhead as you used it in giving that testimony regarding the pineapples and the peach seeds and the dust from your plant.

A. I will give you a general definition of overhead without reference to the overhead of our Gerlach plant. Is that what you desire?

Q. I want you to give me a definition of overhead as you used it in your testimony when you said, as an abstract proposition, it is not an item to be included in determining the cost of production of a by-product. Now, you tell me what you meant when you gave that testimony.

A. What you mean by overhead, what any accountant means by overhead, are costs which you would describe as the general and administrative costs of carrying on a business operation as distinguished from costs of production or as distinguished from cost of selling. General and administrative costs constitute overhead. That includes, let us say, the cost of the general [279] management. If I may illustrate, the cost of the president's salary would be a typical overhead. The cost of the secretary and treasurer's salaries would be a typical overhead. Legal expense, the fees you pay your attorneys

(Testimony of C. Bruce Flick.)

would be a typical overhead. The cost of auditing, fees for your public accountants is an overhead. Cost of telephones and telegraphs, the cost of subscriptions and donations, the cost of a personnel department, the cost of a purchasing department, the cost of the traffic department might be considered overhead, the cost of your credit manager is customarily part of your overhead, your general corporation taxes might be considered overhead—all of those general and administrative expenses which the accountant considers in a different category from expenses which are cost of production or cost of selling. Cost of bookkeeping is a part of cost overhead.

Q. And if it is a business that has a head office and branch offices, a certain part of the head office expense would be considered as overhead, would it?

A. No.

Q. What would you include that in?

A. General and administrative.

Q. I thought you said that that was part of overhead.

A. Well, excuse me. Perhaps I did not quite understand it. When you have a head office which administers a number of different plants, that head office is general overhead of the [280] business and not overhead of a particular plant.

Q. And is that customary to allocate a portion of that overhead to the various plants that comprise the whole?

A. I don't believe so.

Q. You do not believe so. Have you give us your best definition of overhead expense?

(Testimony of C. Bruce Flick.)

A. I think that covers the definition quite well.

Q. Using the term as you just defined it, will you tell me whether or not Pacific in its own accounting includes in determining the cost of producing its various items, overhead expense?

A. Pacific in determining the cost of its various items—again I can't help but say this because it influences your statement of what is good accounting—Pacific is producing joint products and not by-products. In accounting for its joint products, Pacific includes in the cost of the product at a particular plant—let us take the Gerlach, Nevada gypsum plant as an illustration—includes in the cost of the products at the Gerlach plant the so-called overhead items at the Gerlach plant. Pacific does not allocate to the Gerlach plant any portion of the overhead from any other plant nor from Pacific's head office in San Francisco.

Q. But you do include in determining your costs of production of articles from that plant, the overhead expenses as you have defined them of that plant, is that right? [281]

A. At that particular plant, those overhead expenses which are definitely incurred at that plant.

Q. How many different items do you make at that plant?

A. I think I enumerated four, didn't I? Agricultural gypsum, hard wall plaster, stucco, gypsum for cement retarder.

Mr. Bennett: May I interrupt a minute, your Honor? I am a little confused. I thought the wit-

(Testimony of C. Bruce Flick.)

ness was talking about the Gerlach plant. Now apparently I am wrong in that. He is talking about some other plant because, as I understood it, there was only one product produced at the Gerlach plant and that was the gypsum itself. Maybe I am wrong.

The Court: Read back, Mr. Reporter, if there is any question about it.

The Witness: No, there are four products, four major products.

Mr. Bennett: Q. Produced at Gerlach?

A. Yes.

Mr. Bennett: Then I was mistaken, your Honor. I thank you very much, and thank you, counsel, for permitting this interruption.

Mr. Rosenberg: Q. Of course, as between those four products you can not accurately determine how much of the overhead is directly attributable to the production of each of the four products that you make there, can you? For instance, the salary of the plant superintendent, is that one of the items [282] in the overhead expense?

A. That is right.

Q. You do not know how much of his time he devotes to each of the four products that you make there, do you? A. No.

Q. So how do you decide how much of his salary you are going to charge to each of the four items that you make there? You allocate it, don't you? A. Yes.

(Testimony of C. Bruce Flick.)

Q. Yes. Sure, and what do you use as your basis of allocation?

A. I think at the Gerlach plant we use a labor basis.

Q. A labor basis?           A. Yes.

Q. So you are not very surprised when you see the Westvaco Company using a labor basis as a means of allocating overhead, are you?

A. I have to repeat, we have no by-product at our Gerlach plant.

Q. Will you please define the term by-product to me as you have been using it in your testimony?

Mr. Bennett: I do not think that is necessary because this contract, your Honor, states on its face that this is a by-product.

Mr. Rosenberg: This contract was not drawn by accountants. It may have one meaning for one person and to an accountant it [283] may mean something entirely different.

Mr. Bennett: All right. I withdraw the objection.

Mr. Rosenberg: Q. Will you please define the term by-product for me as you have used it in your testimony?

A. The term "by-product" means a product which is produced as an incidental product, as a result of reclaiming a waste or as an incidental result of the removal of impurities, let us say, from a major product or purely incidental to the production of a major product. In other words, in an industrial operation you set out with the product



(Testimony of C. Bruce Flick.)

of producing a certain object, and incidentally you can't help producing a by-product. It may be the hull from the pineapple or it may be the pit from the peach, to use those examples, or it may be the sulphates from the production of magnesium oxide.

Q. What is the measure which controls the determination as to whether a particular product is incidental or not and therefore is a by-product?

A. Well, we have to consider the particular circumstances in any case. Generally the characteristic, I think, would be that your by-products may be of two types: One type, it may be something that you are able to sell and get something out of it without doing anything to it. Another typical example of a by-product is a waste material that you have to process before you can sell it for any value. You do not build your plant to produce the by-product. You build your plant to produce the main product, and in the course of that production you just get this material, this by-product material.

Q. And if you build the plant for the purpose of producing two products, would that necessarily control your determination as to whether one is the main product, or one is the by-product?

A. Very definitely. Our Gerlack plant was built to produce joint products or co-products. It was built equally to produce agricultural gypsum, some gypsum for cement retarder, hard wall plaster. The joint products are all made out of the same raw material.

(Testimony of C. Bruce Flick.)

Q. Of course, will you concede this, Mr. Flick, that a product that starts as a by-product may get to be a main product or a joint product, isn't that true?

A. How do you mean that may get to be a main product?

Q. It may assume major proportions.

A. How do you mean it may assume major proportions? In terms of dollar value?

Q. Important to the person who is making it. Would you consider gasoline or kerosene a by-product?

A. It all depends on how those things are made. I am not very familiar with the manufacture of kerosene.

Q. Would you consider tomato juice a by-product, the way it is being made today?

A. Let me understand your question again. What you mean to say is if a certain product starts out as a by-product, that that product may become in future years economically so valuable somebody [285] might build a plant just to produce that item. In that case, it is no longer a by-product.

Q. Let us say you start making the product and you have a plant for it, but the importance of the production and sale of that product economically to the maker increases in such a degree that it becomes a matter of major importance to him, and he either enlarges his plant or produces it in the same plant; would you say that that changes its category as a by-product?

(Testimony of C. Bruce Flick.)

Mr. Bennett: If your Honor please, I think we are getting into the realm of speculation. The situation is in no way analogous to this case.

The Court: We have been from the quarry up to the peach factory.

Mr. Bennett: The point I wanted to make, your Honor, is that here we have an admitted by-product. The contract states that. Secondly, the situation, so far as its importance is concerned, has not changed a bit since the contract was executed. The only difference is the defendants claim that there are increases in the cost of production, some part of which we are willing to admit occurred.

The Court: Read the question, Mr. Reporter.

(The last question was read by the reporter.)

The Witness: A mere change in economic value I do not think would change the character of a by-product as a by-product. [286] Now, let us assume here we have a magnesium oxide, the major product, worth around \$46 a ton, and the by-product, gypsum, worth around, say, \$4.36, claimed price a ton—

Mr. Rosenberg: Q. Now, wait a minute.

A. We might assume—I am trying to trace your example. We might assume gypsum becomes worth \$46 a ton and that magnesium oxide declines in value and becomes worth \$4.36 a ton, and you are asking me whether under such circumstances the gypsum would not longer be a by-product.

(Testimony of C. Bruce Flick.)

Q. That is it. What would you say to that?

A. Well, I would say that the by-product nature of the gypsum would still persist, because it still was produced by the removal of impurities from the material out of which the original major product was made.

Q. And you would continue, for accounting purposes, to treat it as a by-product, would you?

A. We have a 25-year contract which says it is a by-product.

Q. I am not talking about this contract. This is objective testimony, now. Just forget about this contract. You are testifying as an expert. Would you still continue to treat it as a by-product under the hypothesis you have just stated for accounting purposes?

A. Do you mean if I had been treating it all the years during which the change in value had occurred?

Q. You may assume that, also. [287]

A. Well, you might have a problem based upon financial considerations and other considerations. It is hard to imagine a hypothetical situation. Again, whether you have a by-product depends upon what your main purpose in having your plant is. If your main purpose is to produce a major product, that is your major product, and if incidental to that you get this by-product, it is a by-product.

Q. But can't you conceive, Mr. Flick, that you can start a chemical plant with a main product and

(Testimony of C. Bruce Flick.)

minor products without necessarily treating them for accounting purposes as by-products?

A. Whether you have major products and minor products depends upon the relative importance of joint products, and a minor product is not a by-product. Now, for example, if at our Gerlach plant we had a tremendous business in hardwall plaster and a very small business in agricultural gypsum, the agricultural gypsum would be a minor product, but it would not be a by-product.

Q. Let me ask you if you will tell me how you distinguish between a by-product and a joint product? What is your distinction in that respect?

A. I tried to explain that. I will do it again.

Mr. Bennett: It has been asked and answered.

The Court: You may answer.

The Witness: How do I distinguish between a joint product and a by-product? [288]

Mr. Rosenberg: Q. That is right.

A. Joint products are products which are produced from the same raw material, and are of, you might say, equal importance in the plant. Our Gerlach, Nevada, plant is a typical example of joint products. None of those products is produced as a result, let us say, of removing impurities from the others. None of those products is produced incidentally to the production of the other products. They are produced deliberately and on purpose, and we can stop the production of one without having any influence on the production of the others. But when you have a by-product, as this



(Testimony of C. Bruce Flick.)

by-product gypsum, you can't make the main product without removing the sulphate impurities. You can go on and make the main product and dump the by-product material in the bay, as was done for two weeks in September, 1946. You see, the characteristic of the by-product is it is something that comes off first as a waste material, or as a removal of an impurity. It is something that you cannot hardly help producing incidental to the production of the main material. But where you have joint products, as at Gerlach, we bring the rock down from the quarry and we can make anything we please out of that rock. No one product—the plaster is not produced by removing impurities from the agricultural gypsum, or vice versa. You can produce agricultural gypsum without producing gypsum for cement retarder. You can produce plaster without producing stucco for making wallboard. Don't [289] you see, you can make four joint products out of your initial raw material and they are not related in their production in the way that a by-product is related to the production of the major product.

Q. Let us see if I understand you correctly, then, Mr. Flick: If I understand you correctly, the thing that controls your determination as to whether an item is a by-product or a joint product is whether or not you can continue making another product and either make the product in question, or not, isn't that it? Is that what controls your determination?

(Testimony of C. Bruce Flick.)

Mr. Bennett: Could I have that question read?

Mr. Rosenberg: I would rather not have that question read, that was so terrible.

The Court: Reframe your question.

Mr. Rosenberg: Q. Do I understand, then, that the thing that controls your determination as to whether or not a product is a by-product or a joint product is as to whether or not you could continue making another product in the plant out of the same raw material, and either make or not make the first product, as you see fit? Does that correctly state your position?

A. Well, the characteristic, again, of the by-product, is that it is a product which comes off incidental to the production of the main product, and it is characteristic of a by-product that the by-product material has no value at the point of separation. [290] You have got to do something to it to give it market value, and you go on producing the main product. You still have to remove these impurities or get rid of this waste, but you go on producing your main product. Now, if you have two joint products, a joint product is very well exemplified in the pineapple industry. You have your by-product. The shells that you take off the pineapple come into bran. You have as joint products sliced pineapple, crushed pineapple, pineapple juice. Do you see the distinction I am trying to make? Joint products you make out of your major material. Your by-product is basically a

(Testimony of C. Bruce Flick.)

waste you get rid of. You are able to process it and get something out of it.

Q. And in the pineapple case you can make only one or two of those ultimate products without making the third, isn't that true?

A. You mean you could make the canned fruit without making the pineapple bran?

Q. Surely.

A. Surely, you could throw the waste away. You would not have to make something out of it.

The Court: It is time for adjournment.

(Thereupon an adjournment was taken until tomorrow, Friday, December 12, 1947, at ten o'clock a.m.) [291]

Friday, December 12, 1947, 10:00 o'clock a.m.

The Court: You may proceed.

### C. BRUCE FLICK

resumed the stand.

#### Cross Examination—(Continued)

Mr. Rosenberg: Q. Now, Mr. Flick, if I understand your testimony correctly, your conclusions that it is improper to charge overhead and indirect charges to the cost of producing gypsum is based upon your conclusion that gypsum is a by-product, is that right?

A. Gypsum is a by-product and under the contract that we are concerned with, we have the term "actual advance in cost of manufacture," which involves the comparison of two twelve month periods.

(Testimony of C. Bruce Flick.)

Q. What does that comparison of two twelve month periods have to do with the question as to whether in two twelve month periods you include overhead and indirect charges?

A. It has a very great deal to do with it because in order to determine the actual advance you have to find out whether the apparent bookkeeping advance is in fact an actual advance and not merely a hypothetical advance based on some assumed bases of allocation.

Q. That goes to the propriety of the allocation rather than to the propriety of the inclusion as a general principle, doesn't it? [292]

A. It goes to the propriety of allocating indirect items to the cost of manufacture of a by-product first. Second, you have got that comparison, which you must always keep in mind in connection with this contract.

Let me say this: Charges which would be perfectly admissible as direct charges may under some circumstances distort the comparison of the two twelve months periods so as to produce a bookkeeping result which is not an actual advance. For example, I have stated that in my opinion it is perfectly admissible to charge to the cost of manufacture of the by-product gypsum the cost of repairing the machinery by which you dry and grind and ship the gypsum. If in one twelve month period there was a deliberate, very large amount of repair work done, wherein the preceding twelve month period there was practically no repair work done,

(Testimony of C. Bruce Flick.)

the comparison between the two periods would show a substantial advance in the cost of manufacture of the gypsum, which would not be an actual advance in the cost of manufacture, but merely a rigging of the charges between the two twelve month periods.

Now, let me clear this up. I am not implying for a moment that there has been any such thing. I am merely pointing out as an abstraction the importance of keeping in mind always that we are concerned with the comparison of two twelve month periods.

Q. You are mentioning repair labor. Do you consider that an [293] overhead charge or an indirect charge?

A. No, I consider repair labor—

Mr. Rosenberg: Just a moment—

The Witness (Continuing): —repair labor—

Mr. Rosenberg: Q. Do you consider that an overhead charge or an indirect charge?

A. No, I consider repair labor of machinery in the gypsum department, actually repairing, drying and grinding machinery a direct charge.

Q. Maybe I do not make my questions clear, Mr. Flick. That has nothing to do with overhead or indirect charges, has it, the direct labor charges?

A. It has to do with the comparison of the twelve month period and you can not ever forget that, no matter whether you are talking about overhead or direct charges or what you are talking about.



(Testimony of C. Bruce Flick.)

Q. But what I am trying to find out from you is this: Am I true in saying, in the first place, that you concede as a general principle of accounting that in determining the cost of producing a manufactured article—and we will eliminate now and consideration of a by-product—that it is proper to include in your cost of production the overhead charges that are properly allocated to that article? Will you concede that?

Mr. Bennett: Just a moment, your Honor. I object to that question as wholly irrelevant and immaterial. We are dealing [294] here with a by-product, and whether or not it is a by-product is something that the defendants are foreclosed to assert because the contract specifically says it is a by-product incidental to the manufacture of their primary products. Now, if counsel are seeking to prove for your Honor that this is not a by-product, then certainly they are seeking to change specifically the express and explicit language of the contract. There is no question, there can not be any question in your Honor's mind, so far as this contract is concerned, and so far as the function of the Court is involved in determining or interpreting these terms "cost of production" or "actual advance in cost of manufacture" that the product involved is a by-product because the contract specifically states it is, and so far as accounting principles are concerned, we are entitled to proceed upon that assumption. Whether or not any factors have intervened to change the character of that

(Testimony of C. Bruce Flick.)

problem is wholly immaterial because the contract governs.

Mr. Rosenberg: If your Honor please—

The Court: You have divorced this so-called by-product out of your question entirely, have you not?

Mr. Rosenberg: Yes, for this simple reason, that whether or not is a by-product or it is not a by-product, it is our contention, makes no difference for the purpose of determining the proper accounting methods. Now, this witness has given a lot of testimony in which he stated that he felt it was improper [295] to include overhead and indirect charges in the cost of producing this product, whether it is a by-product or a co-product, purely on the basis that it is a by-product.

The Court: Read the question, Mr. Reporter.

(Question read.)

Mr. Bennett: Before your Honor rules, may I be heard?

The Court: I interrupted counsel. He has not had an opportunity to be heard.

(Question reread.)

The Court: The objection is overruled. I am prepared to let the witness answer it. He may answer the question.

The Witness: In answering the question now, we are not talking about a by-product.

Mr. Rosenberg: Q. No.

A. Your question specifically eliminated the question of a by-product.

(Testimony of C. Bruce Flick.)

Q. That is true.

A. So we are talking about joint products or co-products or just one product.

Q. That is right.

A. Now, the cost of production is composed of the direct cost for labor and material and supplies and all those things. Where you are concerned with actual cost of production, you do your best to find out what the actual costs are and you allocate as little as possible or nothing. Now, you will find accountants [296] who are "allocation happy," if you want to call them that. They want to allocate everything clear on up to the president's salary, but there is a definite difference between cost of manufacture and general and administrative expense and general overhead and selling expense and these other things.

Q. Mr. Flick, you remember your own definition of overhead that you gave yesterday?

A. I think I remember it in general.

Q. All right. What I am trying to have you tell me is whether or not you concede that overhead expense, as you yourself define it, and again eliminating any consideration of a by-product, whether that overhead expense, in accordance with good accounting practice, is a companion factor in the aggregate cost of producing the article. Now, is that true or isn't it true?

Mr. Bennett: I suppose my objection runs to this line, your Honor.

(Testimony of C. Bruce Flick.)

The Court: Yes. Answer. Do you wish the question read?

The Witness: I think I understand it. The question is whether overhead expense is properly includable in cost of manufacture.

Mr. Rosenberg: Q. That is right.

A. Well, again, if you make hypothetical, theoretical allocations of overhead expense to cost of manufacture, they may be on the books but they are not actually a part of the cost of manufacture. And, as I say, you can find accountants who are [297] allocation happy and who will allocate everything on up to the president's salary, but there is a place where you should stop. The cost of manufacture means cost of making something. It does not mean the cost of telephoning to somebody you are going to sell it to or anything of that sort, or the cost of legal expense to have litigation over a contract.

Q. Mr. Flick, you included president's salary in overhead expense in your definition yesterday, didn't you?

A. I included president's salary as overhead expense, and I am denying it should be included in cost of manufacture.

Q. All right. I am asking you if you included that in overhead.

A. The president's salary?

Q. Yes.

A. That is general and administrative overhead expense.

(Testimony of C. Bruce Flick.)

Q. I am asking you as an accountant whether or not in determining the cost of producing a manufactured article, it is common practice to include overhead expense in such costs. Can't you answer that yes or no?

A. It is not good accounting practice to include the president's salary in the cost of manufacture.

Q. Didn't you tell me yesterday in your own accounting system that Pacific Portland Cement Company you include overhead expense in determining the cost of the various products that you manufacture? [298]

A. We were talking, Mr. Rosenberg, about one particular plant of the Pacific Portland Cement Company, which was the Gerlach, Nevada plant.

Q. All right. I will confine my question to that.

A. We do not charge any part of the president's salary or the secretary and treasurer's salary or the credit manager's salary or any of those overhead salaries. We do not charge any part of those salaries to the Gerlach plant.

Q. Your overhead account, whatever it comprises—and you mentioned at least eight or ten difference items that it comprised—you do include overhead expense in determining the cost of producing the various items that you produce in that plant, do you not?

A. I do not believe we include any one of the overhead items that I mentioned yesterday.

Q. What do you include?



(Testimony of C. Bruce Flick.)

A. We include at our Gerlach plant—and again at Gerlach we have joint products and not by-products—we include the cost at that plant.

Q. Of what?

A. Of the labor, materials, the supplies, the repairs—

Q. I am talking about overhead, Mr. Flick.

A. The plant superintendent.

Q. What else?

A. The taxes on that plant. [299]

Q. Yes.

A. The workmen's compensation insurance, the social security taxes, both of which I have mentioned as direct charges, the property taxes on the plant, anything which is at that plant.

Q. Telephone and telegraph? A. No.

Q. Where do you put that?

A. I am quite sure that is paid in San Francisco and charged in our general overhead.

Q. How about bookkeeping? Do you have any bookkeeping there?

A. We have at the plant one timekeeper to keep the actual time charges of the men and we have a storeskeeper to record the actual issuances of materials and supplies and we have a man we call a chief clerk, who actually spends most of his time arranging for freight cars to take the stuff away and that sort of thing.

Q. Does that go into general overhead?

A. No, that is charged at Gerlach and apportioned among those joint products.

(Testimony of C. Bruce Flick.)

Q. I say as overhead of that plant?

A. At that plant, yes.

Q. As overhead?

A. Well, I don't know—

Q. How do you allocate it?

A. I don't know that we call it overhead. I told you it was [300] spread, the expenses are spread to the products at that plant, which are joint products. Now, the overhead is mostly at San Francisco and is not charged in any account to the Gerlach plant.

Q. Let me put it this way: Mr. Flick, you have a number of expenses at that plant that are indirect in the sense that you can not charge them directly to the various products that you make in the plant, isn't that true? Well, your plant superintendent. You told me yesterday you do not keep track of how much of his time he devotes to each of the separate products there, so that is allocated among those products?

A. That is true, and that superintendent has no function except supervision.

Q. But you do have a number of expenses at the plant that you can not charge to the various products that you manufacture, do you not?

Mr. Bennett: I do not understand that question. It is ambiguous and uncertain.

Mr. Rosenberg: I will withdraw that question. I will put this question and then I will leave the subject:

Q. Is it your opinion as an expert accountant that in determining the cost of producing manu-

(Testimony of C. Bruce Flick.)

factured products that it is not in accordance with good accounting to include as an element of the cost of manufacture overhead expense properly and fairly allocated to the product? [301]

A. Properly and fairly allocated.

Mr. Bennett: I did not get that answer.

The Court: Read the question and answer, Mr. Reporter.

The Witness: I was pausing on that term.

(Question and answer read.)

Mr. Bennett: Your Honor, in addition to the objection that runs to this line of inquiry, I wish to add the further objection that it injects the hypothetical situation and a conclusion, fairly and reasonably, or words to that effect.

Mr. Rosenberg: I will say if the amount allocated is allocated by methods and means that are fair and reasonable and in accordance with good accounting practice.

The Witness: That would be for the accountant to have to judge in each case based upon the circumstances, whether in his opinion as an accountant it would be fair and reasonable.

Q. (Mr. Rosenberg): I am speaking only about the method of allocation, Mr. Flick. Let me reframe the question. I am asking you now as an expert accountant whether or not it is an accepted practice and in accordance with good accounting practice in determining the cost of producing a manufactured article to include as an element of

(Testimony of C. Bruce Flick.)

that cost the overhead of the plant in which that article is made?

A. And your article again refers to an article which is not a byproduct?

Q. That is true. [302]

A. An article which is not a byproduct. Is it proper to include in the cost of manufacture overhead, an apportionment of overhead. Again, as I indicated before, you have got to determine what you mean by overhead. Overhead is a pretty broad term and goes all the way up to the top. Now, if you take a plant such as our Gerlach, Nevada plant, we by our own practice allocate the overhead at that particular plant, and those particular types of overhead, and considering the function of the men who are included in the overhead at that plant, we allocate that to the products produced at that plant.

Q. That is right.

A. But we have many types of overhead which are not allocated to that plant at all. We do not allocate a nickel from our San Francisco office.

Q. (The Court): If I followed your testimony, you indicated you were producing four major articles.

A. Yes, sir.

Q. Now, how is the overhead applied to those four, for example?

A. We apply the overhead to the different departments in the plant based upon the percentage of labor payroll in those departments. And, of course, some departments function, you might say,

(Testimony of C. Bruce Flick.)

for all four products. For example, the crushing machinery, when the rock comes down from the quarry, you crush it up.

Q. But you allocate overhead to each one of those? [303]

A. Yes.

Q. (Mr. Rosenberg): Are your accounting practices the same in your Redwood City plant as they are at Gerlach with reference to overhead?

A. Yes.

Q. Exactly the same? A. Yes.

Q. Now, the question I first asked you, and I do not know whether you understood it or not, is this: In arriving at your conclusions that you have expressed throughout your testimony that overhead expense is not a proper item in the cost of producing gypsum in the Newark plant of the Westvaco Chlorine Products Company, have your conclusions been based upon what you conceive to be good accounting practices as a general proposition or have they been based upon what influenced or based upon what you conceive to be the meaning of the contract? [304]

Mr. Bennett: Well, your Honor——

Mr. Rosenberg: I want to know whether the witness is stating as an abstract proposition that overhead expense is not a proper factor to include in the cost of producing a by-product, or whether his conclusions that he expressed on the witness stand have been influenced by what he conceives to be the effect of the contract that the parties entered into.



(Testimony of C. Bruce Flick.)

Mr. Bennett: I think that is confusing and ambiguous.

The Court: I don't think we would be here only the witness on the stand examined the contract. While there is no testimony in that regard, it doesn't seem to be in doubt. Read the question, Mr. Reporter.

(The question was read.)

Mr. Bennett: I will add to the question that the objection is confusing and uncertain, and the further objection is that the witness has answered it I don't know how many times.

The Court: He may answer. I will allow him to answer.

A. (The Witness): It is my opinion that the allocations of those items included in overhead at the Newark plant, allocations of those items to by-product gypsum are not properly includable as cost of manufacture of the by-product gypsum. May I read from their accounting schedule the items which made up the overhead? Overhead is an awfully broad term. If I can be less general and more specific——

Mr. Rosenberg: Well, I wish he would first answer the [305] question and then explain.

Mr. Bennett: He answered it.

Mr. Rosenberg: Why don't you let me make a statement without interrupting me, Mr. Bennett?

Mr. Bennett: I beg your pardon. I did interrupt.

The Court: The objection goes to the point you

(Testimony of C. Bruce Flick.)

have not answered his question. You can answer the question and then you may make an explanation.

The Witness: I would say first that the overhead at Newark is not, in my opinion, properly to be allocated to the cost of manufacture of the by-product gypsum, and I would like to explain—

The Court: You may.

The Witness: By reading the elements which compose the overhead, because we can very easily be misled by broad generalities and terms like overhead. The accountant should deal with facts and not with general terms. Let me read the list of items.

Mr. Rosenberg: Well, I still ask the witness whether or not his conclusion would be based upon what he conceives to be good accounting practice for a by-product, or whether his conclusions and opinions are influenced by what he conceives to be the meaning of the contract that the parties entered into.

The Court: You may answer.

The Witness: I will have to stop a minute and straighten [306] out my motives and psychology now, won't I? I believe my answer reflects my opinion as to what is good accounting practice in these particular circumstances, and I think I have already testified as to what I considered good accounting practice under the contract.

Q. (Mr. Rosenberg): When you say your opinions have been based on what you consider to be

(Testimony of C. Bruce Flick.)

good accounting practice, under the circumstances, do you include in the circumstances the fact that the parties entered into this particular contract?

The Court: In effect he so testified. If not, answer the question.

The Witness: I include particularly in the circumstances the facts of production as I understand them, because an accountant must have some understanding of the facts of production before he can judge the accounting records which purport to reflect and record the facts of production, and the facts of production, as I understand them here, are that this gypsum is in effect a removal of an impurity from the product which has to go on to be manufactured into magnesium oxide; you get the sulphates out, you precipitate, filter out the gypsum. So, as I understand the facts of production, regardless of the contract, itself—if I may read these overhead items, I could answer your question much better.

The Court: Did we not go over those items on direct examination? [307]

Mr. Rosenberg: Yes; I think we did.

Q. I want to find out whether his opinions are based upon what he conceives to be a good accounting practice for a by-product, or whether he is basing his conclusions upon the fact that he believes that under this contract only direct charges were entitled to be included. I still want the question answered.

Mr. Bennett: I think he answered.

(Testimony of C. Bruce Flick.)

The Court: Yes.

Mr. Bennett: He said it was based——

The Court: Let's clear it up. Answer the question.

The Witness: It is difficult, in my opinion, to get away from some of these considerations because they are part of the facts you consider. Good accounting practice for a by-product in the comparison of two twelve-month periods. You might change your account method from one period to the next. You might say this year I have discovered last year's method was not so good, so this year I will do it right. Then in comparing the two to get the price the product should be increased, it is not an actual advance in cost of manufacture, that is a question of accounting as well as a question under the contract. Any accountant knows that good accounting practice is if you compare two twelve-month periods you have got to have the same accounting methods consistently or you don't get a true comparison, you get a bookkeeping comparison, or a theoretical comparison. [308]

Mr. Bennett: Counsel if that is not clear, I would like to ask a question, a further question. I don't want to have the matter passed without comment. That answers the question. Do I understand your purpose in the questioning of the witness is whether his statement as to proper accounting methods for a by-product would have been the same as he has given here, even though this contract was not made here? Is that what you mean?

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: That's right.

Q. I understood his testimony yesterday, testifying as an expert and as an abstract proposition when he was referring to pineapples and peach seeds, and things of that sort, that he stated as an abstract proposition that it is not proper to include the cost of manufacture overhead expense. Is that correct? Let me ask the witness, is that a correct statement, is that your expert opinion?

A. As a part of the cost of manufacture of a by-product, and again I have to qualify it because when you say "overhead" I don't know what you mean.

Q. I asked you yesterday to define the term as you used it in your testimony, and you are using it in the same sense now.

A. As I used the term, in my opinion it is not properly allocable on a hypothetical basis to the cost of production of a by-product.

Mr. Bennett: I think that answers the question. [309]

Q. (Mr. Rosenberg): If you will just explain what you mean by a hypothetical basis, I don't understand that.

A. A typical example of a hypothetical basis is the assumption that the percentage of labor payroll is related to all the elements of overhead which are allocated, on such a basis it is a pure arbitrary hypothetical matter, or an assumption.

Q. Well, it is arbitrary.           A. Right.



(Testimony of C. Bruce Flick.)

Q. But it is a basis of allocation that is very commonly used, and which you, yourself, use in your Gerlach plant?

A. We use it for our joint products at Gerlach, yes.

Q. I show you a letter of October 2, 1941, which is Plaintiff's Exhibit 1 here. You have testified that shortly after you went into the employ of Pacific Portland Cement Company you went into Mr. Canvin's files, and among other things you found that letter.

A. That is correct. I became controller in June of 1943, and as the controller it was probably about that time, or shortly after that I took a look at this contract and the files connected with it, and I found this letter from Mr. Hurlbert with these figures.

Q. You read the letter and you inspected the sheet that was attached?      A. Yes.

Q. Which purports to show the gypsum manufacturing cost for [310] the years July, 1930, to June, 1940, as compared to July, 1940 to June, 1941?      A. Yes.

Q. You knew that the price of gypsum under the contract had been increased 18 cents as a result of an increase that occurred prior to the time you went into the employ of the company?

A. That is correct.

Q. The statement accounted for 15 cents of the 18-cent increase?      A. That is correct.

Q. You read the letter, did you?

(Testimony of C. Bruce Flick.)

A. Yes.

Q. You read the part which says, "If you desire further information in re the attached statement, or in connection with a basis of determining increase in cost please call the writer." You read that?

A. Yes, that is correct.

Q. Did you make any inquiry as to what the other three cents of that increase was composed of?

A. I made no inquiry of Westvaco. I discussed the letter with Mr. Canvin in June of 1943.

Q. But, at any rate, you, as controller, never inquired at that time of Westvaco to ascertain what the balance of the 3-cent increase was composed of?

A. At that time, as controller, I made no inquiry of Westvaco because my understanding was that the direct charges were [311] the charges I was to be concerned with under the contract. That was my job as controller, to find out what I was supposed to concern myself with under the contract.

Q. You mentioned a conversation that you had with Wallace and Mr. Cuneo, I believe you said, on January 14, 1944; do you recall that?

A. Yes.

Q. That was at the time that you were informed that Westvaco was claiming to notify you of an additional 78-cent increase in the cost of production of gypsum that would result in a price of \$3.76 per ton?

(Testimony of C. Bruce Flick.)

A. That is correct; January 14th was the date when we went down there to look at the details.

Q. So you and Mr. Canvin——

A. Yes.

Q. And your Mr. Riddell?

A. Yes, our chemical engineer.

Q. You went there and spent some time with Mr. Wallace, Mr. Cuneo, going over the figures relating to this price increase?

A. Correct. On that occasion we spent one day.

Q. I believe you said that it was not your function to go over there and argue with anybody, so you did not raise any objection at the time of the conference?

A. That is correct. At that time I was controller, and my only function on that trip was to get information. [312]

Q. Then shortly after that conference do you remember that you wrote a letter asking for some detailed information with reference to this price increase?      A. Yes.

(Recess.)

Q. (Mr. Rosenberg): Mr. Flick, I will show you what purports to be a copy of a letter dated January 29, 1944 written to Pacific Portland Cement Company, to your attention, signed by Westvaco Chlorine Products Corporation, by Vernon E. Cuneo, plant office manager, and ask you if you recall receiving the original of that letter (handing document to witness).

A. Yes, I recall receiving this.

(Testimony of C. Bruce Flick.)

Q. And the enclosures that are attached to it?

A. Yes.

Mr. Rosenberg: I will offer that in evidence, if the Court please.

The Court: Let it be admitted and marked.

Mr. Bennett: You are offering that for the purpose, I presume, of cross examination and not to establish the truth or accuracy of the actual or the existence of those costs, are you, Mr. Rosenberg?

Mr. Rosenberg: I am offering it for the same purpose that you offered Mr. Flick's letter of November 4, 1946, Mr. Bennett, and that is to show the course of relations between the parties relating to this contract.

Mr. Bennett: Yes, and not as evidence of the actual existence of these costs nor the propriety of the costs, is that correct?

Mr. Rosenberg: No, I won't limit myself. Attached to [313] this letter if the Court please, are two cost sheets furnished at the request of the plaintiff showing the cost of production of gypsum from July, 1939 through June, 1940 and July, 1940 through June, 1941, which is the period covered by the 18 cent increase and for the calendar year 1942 and the calendar year 1943, which is the period on which the 78 cent increase or the \$3.76 price was based.

Mr. Bennett: Your Honor, I have no objection to the offer of this letter in evidence for the purposes first stated by counsel, but I do object to it as any proof or evidence of the validity or genuine-

(Testimony of C. Bruce Flick.)

we understood you to say that the same accounting principles and procedure have been followed since the inception of operations under the contract. Naturally, this is an important point and we shall appreciate it if you will put in writing the description of the accounting basis for each classification of cost and state whether it has been consistently followed since the inception of the contract.

“2. The classification of costs for which you gave us figures for 1942 and 1943 included the following:

“Operating labor, repair labor, operating materials and supplies, repair materials and supplies, fuel oil, gas, power, workmen’s compensation insurance and social security taxes, water, depreciation, insurance, taxes (real and personal property), laboratory, process control and research, [316] general plant expense, engineering and maintenance supervision, purchasing and stores, accounting, overhead, bittern.

“Please give us the figures for each of these items for the twelve months July 1, 1939, to June 30, 1940, and the twelve months July 1, 1940, to June 30, 1941. Mr. O. J. Hurlbert, then your chief accountant, wrote us a letter on October 2, 1941, giving the figures for labor, materials, and power, but we do not have in our files any other detail and shall appreciate it if you will give us the complete set of figures supporting the increase of 18c per ton which went into effect October 5, 1941.

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(Testimony of C. Bruce Flick.)

"3. The original contract price of \$2.80 per ton for gypsum presumably was based on a set of actual or anticipated cost figures. We shall appreciate it if you will furnish these figures.

"4. The item of laboratory process control and research amounted to \$7,432.00 for 1943 and \$3,352.00 for 1942. Please give us the breakdown of this item.

"Thanks again for the courtesies extended to Mr. Canvin, Mr. Riddell, and the writer when we visited your plant on January 14.

"Very truly yours,

"Pacific Portland Cement  
Company,  
/s/ C. B. Flick,  
"Controller" [317]

And in the margin opposite the paragraph starting "Please give us the figures for each of these items," there is a notation by Mr. Flick in long-hand, "not month by month, C. B. F."

Q. That is your handwriting on there, isn't it, Mr. Flick?

A. Yes. I did not want to bother them with a lot of monthly detail. I was concerned at the time only with the annual results.

Q. The letter of January 29, 1944 from Mr. Cuneo to you and which has been marked for identification as Defendant's Exhibit A, is the letter that you received in response to your letter of January 18, is it?

(Testimony of C. Bruce Flick.)

A. Yes. It says at the outset, "This letter is in answer to yours of January 18."

Mr. Rosenberg: Now I will offer it in evidence, if the Court please.

Mr. Bennett: Again, Your Honor, I think I am entitled to ask for the purpose of the offer. If the purpose is simply to show the reply and the claim or the assertions made and the positions taken by the defendant, I have no objection for that purpose, but I object to the letter being received in evidence for the purpose of showing in any way the validity, the accuracy or the truth of the statements made or the amount of the figures and items set forth, and further, the propriety or basis for the claimed allocations made in the letter. In other words, Your Honor, I have no objection to this letter being received [318] for the purpose of the defendants stating their claim or position at that time to this plaintiff, but I object to it being received as evidence of the truth or the validity or the accuracy or the existence of the facts shown because it would not be the best evidence and would be incompetent, irrelevant and immaterial.

The Court: For the purpose of the record, state the purpose of the offer.

Mr. Rosenberg: The record shows, if the Court please, this was accounting information given to the plaintiff after the plaintiff had sent its accountant over to the plant and had gone over the record, and it contains the accounting information which had been requested by the controller after an inspec-

(Testimony of C. Bruce Flick.)

tion of our records. Now, I submit the objection goes to the weight of the evidence rather than to its admissibility. The information was furnished at the request of the plaintiff, and the plaintiff is bound by it only to the extent that it has bound itself by its conduct. They already have in evidence the correspondence which they took exception to.

The Court: The objection is overruled. Proceed.

(Defendant's Exhibit A for identification was thereupon received in evidence.)

Mr. Rosenberg: This letter is dated January 29, 1944.

Mr. Bennett: Did the Court overrule the objection as to all purposes and admit this letter for all purposes, including [319] the grounds of my objection?

The Court: It may go in for what it is worth.

Mr. Rosenberg (Reading): "January 29, 1944

"Pacific Portland Cement Company

"417 Montgomery Street

"San Francisco, California

"Attention: Mr. C. B. Flick, Controller

"Gentlemen:

"This letter is in answer to yours of January 18 requesting certain information pertinent to our costs of producing gypsum. Following we present the basis of distributing each class of cost and we believe that such basis has been substantially followed consistently since the inception of the contract.

(Testimony of C. Bruce Flick.)

“1. Operating and Repair Labor.

“Actual time card distribution.

“2. Repair Materials and Supplies.

“Storeroom requisitions and direct purchases.

“3. Fuel, Oil, Gas and Power

“As measured or allocated on load and/or hours use basis.

“4. Workmen's Compensation Insurance

“Self-insurance. Same rate to all departments, but a very low rate has been in effect.

“5. Social Security Taxes.

“Actual on labor. [320]

“6. Water.

“At cost, measured distribution.

“7. Depreciation.

“Proportional to initial plant evaluation.

“8. Insurance

“Fixed %, roughly proportional to the values insurable, but altered to weight properly the explosion hazard, etc., in certain departments.

“9. Taxes

“Fixed %, roughly based upon evaluation of plant.

“10. Laboratory Process Control and Research.

“Laboratory and Process Control: Direct labor basis along with overheads.

“Research: Allocable portion to department served. Unallocable portion and new products—direct labor along with general overhead.

“11. General Plant Expense, Engineering and Maintenance, Supervision, Purchasing and Stores, Accounting and General Overhead.

(Testimony of C. Bruce Flick.)

“Allocation on direct labor basis. (Some accounts first subtract flat amounts for outside locations’ service; others apply to all locations, as General Overhead, and are spread on direct labor all locations.

“12. Bittern

“A nominal and rather arbitrary 20c per ton was [321] charged.

“13. Loading and Shipping Expense

“Actual loading labor and power plus pro-rata of shipping foreman and miscellaneous shipping expense.

“As mentioned to you here, the work sheet which we discussed and of which we furnished you with a typed copy did not include the loading and shipping expense on gypsum inasmuch as the unit cost of this function did not change 1943 over 1942. The reason such cost did not change was that due to scarcity of labor we permitted one man to do the loading job during a portion of 1943 where safety precautions had formerly caused us to have two men always work together on this work.

“Now that you have asked us for full detail of all costs which we had charged against gypsum production, we are herewith submitting our manufacturing cost sheet showing the loading and shipping item to a total production cost figure. The report is then comparable to that which, as per your request, we are also submitting herewith for the fiscal years ending June 30, 1940, and June 30, 1941, detailing costs on which the previous increase was based.



(Testimony of C. Bruce Flick.)

“We do not find any actual or anticipated cost figures used as a basis at the time the original contract price of \$2.80 per ton was arranged.

“Following is the data you asked regarding breakdown of the 1942-1943 laboratory process control and research items: [322]

Gypsum Department			
	1942	1943	% Incr.
Laboratory .....	\$2,824.27	\$3,374.01	19
Process Control.....	528.23	1,010.85	91
Total Costs			
Laboratory .....	\$49,844.84	\$63,059.07	26
Process Control.....	9,559.60	18,894.18	97

“Research Department costs in 1942 were low due to staff’s being engaged in new products research for Rubber Reserve Company, but in 1943 new products research represented a substantial charge against Newark operations, comprising \$41,390 of the Research Department total of \$64,274.00. Gypsum Department was charged \$2,804 or 6.78% of this new products research on a Newark direct labor pro rata basis. Gypsum Department also received \$243 in 1943 of directly allocated research charges.

“We hope you will find the foregoing answers your questions of January 18.

“Very truly yours,

“Westvaco Chlorine Products  
Corp.

“Vernon E. Cuneo,  
“Plant Office Mgr.”

	July '39 thru June '40	July '40 thru June '41	Increase in
	Cost	Per Unit	Unit Cost
Production .....	27,685 tons	32,000 tons	
Labor, Operations .....	\$ 5,400.62	\$ .19	\$ .02
Labor, Repairs .....	2,945.54	.111	.02
Comp. Ins. & SS Taxes .....	439.33	.02	.01
Materials, Operations .....	585.91	.02	.11
Materials, Repairs .....	2,804.99	.10	.02
Power .....	3,064.01	.11	.02
Fuel .....	3,082.39	.11	.02
I.D.C.—Water .....	985.82	.04	.03
Sub Total .....	\$19,308.61	\$ .70	\$ .09
Bittern .....	2,820.73	.10	.04
Total Direct .....	\$22,129.34	\$ .80	\$ .13
Taxes, Ins. & Deprec. ....	10,379.84	.37	.01
Overhead .....	8,130.66	.29	.06
I.D.C.—Water .....	158.06	.01	.01
Total Manufacturing .....	\$40,797.90	\$1.47	\$ .19
Load. & Ship. Expense .....	5,369.53	.19	.01
Total .....	\$46,167.48	\$1.66	\$ .18

## GYPSUM PRODUCTION COSTS

	Year 1942		Year 1943		Increase in Units Cost
	Cost	Per Unit	Cost	Per Unit	
Production .....	31,826 tons		24,431 tons		
Labor Operations .....	\$ 8,269.87	\$ .26	\$ 9,535.58	\$ .39	\$ .13
Labor Repairs .....	3,664.81	.12	3,806.72	.16	.04
Comp. Ins. & SS Taxes .....	605.94	.02	701.11	.03	.01
Material Operations .....	106.83	....	568.08	.02	.02
Material Repairs .....	1,977.95	.06	1,601.67	.07	.01
Power .....	4,723.33	.15	4,511.12	.18	.03
Fuel .....	3,125.16	.10	3,364.66	.14	.04
Water .....	172.45	....	328.90	.01	.01
Sub Total .....	\$22,646.34	\$ .71	\$24,417.84	\$1.00	\$ .29
Bittern .....	6,365.23	.20	4,900.83	.20	....
Total Direct .....	\$29,011.57	\$ .91	\$29,318.67	\$1.20	\$ .29
Overhead .....	13,404.99	.42	20,108.53	82	.40
Taxes, Ins. & Deprec. ....	13,017.79	.41	11,968.34	49	.08
I.D.C.—Water .....	44.35	....	75.00	.01	.01
Total Mfg. ....	\$55,478.70	\$1.74	61,470.54	\$2.52	\$ .78
Loading and Shipping Exp. ....	5,884.37	.19	4,726.04	.19	....

(Testimony of C. Bruce Flick.)

Attached to the letter is, first, a tabulation showing the gypsum production costs for the two periods, July 1939 through 1940 and July 1940 through 1941, and the items which are reflected on that statement are labor operations, labor repairs, compensation insurance and social security taxes, [323] materials, operations, materials, repairs, power, fuel, I.D.C.—water, bittern, taxes, insurance and depreciation, overhead, I.D.C.—water, loading and shipping expense.

Mr. Bennett: Counsel, before you leave there, you have left out certain head totals on the left-hand column. Perhaps Your Honor would be interested in seeing this (handing a copy of the exhibit to the Court).

Certain of the first items that you read are listed under the title "Production." Those were the items listed under the title "Production: Labor, Operations, Labor, Repairs, Compensation Insurance and Social Security Taxes, Materials, Operations, Materials, Repairs, Power, Fuel, O.D.C.—Water."

Then the next title is "Subtotal," and then the item of bittern is set up and then the title "Total Direct," and underneath that are the items of taxes, insurance and depreciation, overhead, I.D.C.—water, and underneath that the words "Total Manufacturing," with the figures given in each instance to the right, and then underneath that "Loading and Shipping Expense," and underneath that the word "Total." I did not mean to embarrass counsel by interrupting, but he apparently had no pur-

(Testimony of C. Bruce Flick.)

pose in mentioning those classifications that I thought might be of interest to the Court at this juncture.

Mr. Rosenberg: Now, the second tabulation is a tabulation of gypsum production costs for the years 1942 and 1943 and the items—— [324]

Mr. Bennett: Couldn't we stipulate, subject of course to the objections I have made——

Mr. Rosenberg: I would just like to read over the items. In the items there is in the tabulation for each year under the heading of "Production," labor, operations, labor, repairs, compensation insurance and social security taxes, material operation, material repairs, power, fuel and water.

Mr. Rosenberg: I think I may say that the items shown are identical with those shown on the previous tabulation, if I am correct.

Mr. Bennett: That is what I had in mind.

Q. (Mr. Rosenberg): At the time that you wrote this letter of January 29, 1944, Mr. Flick, you examined those tabulations that were attached to the letter, did you?           A. Yes.

Q. And there was no doubt at that time that the \$2.98 price included overhead and indirect expense, so that you were fully apprised of that fact upon receipt of this letter, were you not?

A. Upon receipt of this letter I was apprised for the first time of the cost figures which purported to support an 18-cent increase. Previous to that I had only the letter which was previously referred to here, which Mr. Hurlbert had written Mr.



(Testimony of C. Bruce Flick.)

Canvin, detailing only the labor, material and power.

Q. I assume that upon receipt of that letter, and at all times thereafter, you knew that the \$2.98 price was based upon an 18-cent increase, which included in the items, the total of 18 cents, an increase in cost of production, overhead, and indirect charges?

A. I had Westvaco's—yes, their cost figures would show. I don't know that the price was accepted by Pacific on that basis.

Q. Did Pacific continue paying the price after you received the letter? [326]

A. Pacific was paying \$2.98 before I entered Pacific's employ, and continued to pay it thereafter.

Q. For how long?

A. Pacific paid \$2.98 until September 4, 1946.

Q. That was with your knowledge, was it?

A. Yes.

Q. You knew all during that time that the 18-cent increase that increased the price from \$2.80 to \$2.98, at least at all times after receipt of the letter of January 29, 1944, you knew that that 18-cent increase included overhead and indirect charges, didn't you? A. Yes.

Q. And, as a matter of fact, later in the year there was a written agreement in letter form between Westvaco and Pacific, was there not, whereby Westvaco agreed that it would not avail itself of

(Testimony of C. Bruce Flick.)

the escalator clause for a period of approximately a year; isn't that true?

A. I believe there was such an agreement. The OPA price regulation froze the price at \$2.98.

Mr. Bennett: Would you read the question and the answer, please, Mr. Reporter?

(Record read by the reporter.)

Q. (Mr. Rosenberg): Now, I would like to just refer to these figures here a moment. This \$1, what does that represent?

A. May I refer to this detail I have, the details of that [327] dollar?

Q. Will you explain first what you are referring to?

A. This is a photostatic copy of figures which were furnished by Westvaco at our request.

Q. Yes, that was furnished by the attorneys for Westvaco to the attorneys for Pacific Portland Cement?

A. I believe so.

Q. Since this lawsuit was instituted?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. You prepared the work sheets in blank, did you not?

A. I put the headings in.

Q. Then you gave them to Pillsbury, Madison & Sutro for them in turn to present to us with a request that we provide the information; is that right?

A. That's right.

Q. So there can't be any question about the information that was furnished, there is, first, one sheet for a detail of shipping expense for the cal-

(Testimony of C. Bruce Flick.)

endar year 1937, and the calendar year 1938, the period from July 1, 1939 to June 30, 1940, from July 1, 1940 to June 30, 1941, for the calendar year 1942, for the calendar year 1943, and for the period from July 1, 1944 to June 30, 1945, and the period from July 1, 1945 to June 30, 1946; is that right?

A. Yes, that is correct.

Q. Then the next sheet is overhead and general expense for those same periods; is that true? Well, you have such a sheet. I may not have mine in the same order that you have yours.

A. Yes. Overhead and general plant expense.

Q. You prepared that form designating the information you desire; is that right?

A. The headings only.

Q. Yes.           A. Yes.

Q. The figures were furnished by Westvaco Chlorine Products Corp.?           A. Yes.

Q. There is another sheet for bittern, insurance, taxes, depreciation, inter-departmental water, sulphuric acid, supervision for the same period.

A. Yes.

Q. Another sheet, "Direct charges," Westvaco's charges on the books for cost of production of gypsum, direct charges, and for the same period?

A. Yes.

Q. Then a summary page for the same period accumulating the information contained in the other sheets; is that right?           A. That is correct.

Q. Now, to get back to this, what is this dollar supposed to represent?

(Testimony of C. Bruce Flick.)

A. For the calendar year 1943, Westvaco's figures showed that the sum or aggregate of the items classified as direct charges totaled \$1 per ton of gypsum.

Q. And the 19 cents, that is what?

A. 19 cents shipping expense.

Q. So that this total of \$1.19, that is not your language down there, that is Mr. Bennett's—

Mr. Bennett: No, that is mine. I have no objection to your erasing that, if you want to, and writing your own figures.

Mr. Rosenberg: Well, I have not suggested that I do that. You don't even know that I have any objection to it, Mr. Bennett.

Mr. Bennett: I beg your pardon.

Mr. Rosenberg: You are a little touchy, aren't you?

Mr. Bennett: I thought I would offer to erase that if you wished.

Mr. Rosenberg: Well, I think that would be a very proper way to do it.

Mr. Bennett: All right.

Mr. Rosenberg: That, in fact, is the direct and shipping cost as shown on the sheet from which you are reading; is that right?

Mr. Bennett: The direct and what? [330]

Mr. Rosenberg: And shipping expense.

The Witness: Yes, The \$1 comes from this page marked "Direct charges," and the 19 cents is shown on the page, "For shipping expense."

(Testimony of C. Bruce Flick.)

Q. That does not include anything for overhead and general plant expense, does it?

A. The shipping expense sheet shows some allocated expenses. The direct charges do not include any overhead or general plant expense.

Q. The \$1.19 figure includes nothing for bittern, does it? A. No.

Q. And it includes nothing for insurance?

A. No.

Q. It includes nothing for taxes? A. No.

Q. Does not include any depreciation on the gypsum plant? A. No.

Q. Does not include anything for water used in the gypsum plant, does it? A. Yes.

Q. I am sorry. It does not include any indirect charge for water, does it?

A. It does not include an item called "inter-departmental water."

Q. It includes nothing for sulphuric acid, does it? [331]

A. Nothing for sulphuric acid.

Q. It includes nothing for supervision, does it?

A. Nothing for supervision.

Q. Now, on this figure, here, as I understand it, that \$3.27, that is the \$2.98 price that Pacific has been paying for a good number of years, plus the sum of \$1.19 on direct charges; is that right?

A. No.

Q. Oh, plus 29 cents on \$2.98—

The Court: Just a minute, gentlemen. Remember the reporter.



(Testimony of C. Bruce Flick.)

Mr. Rosenberg: That is the \$2.98 price plus 29 cents in direct charges which Pacific has been willing and concedes have been correctly included in cost of production of gypsum; is that right?

A. Just to clarify it a little bit, the direct charges for the year 1942 were 71 cents, and for the year 1943 they were \$1, so there was an increase of 29 cents which Pacific was quite willing to pay, that would be 29 cents plus the \$2.98, making \$3.27 which Pacific was willing to pay.

Mr. Rosenberg: Then I think the purpose of this was to show that if we accepted the \$3.27 that on the basis of our own figures of \$2.71 we would have made a profit of 56 cents a ton; is that right?

Mr. Bennett: I object to that. You can ask me why I put [332] the figures there. The figures were written on the board by me. If you want to ask me what my purpose was, do so.

Mr. Rosenberg: I will withdraw the question.

Q. Assuming, Mr. Flick, that the purpose of these figures is to show that if Westvaco accepted that price of \$3.27 per ton, that based on their own cost figures they would make a profit of 56 cents a ton; isn't that correct?

Mr. Bennett: I believe I am entitled to answer that.

Mr. Rosenberg: Will you tell me what that is?

Mr. Bennett: Yes. According to figures furnished in the classifications of the defendant, they had for that period 1942, \$1.19 so-called direct charges. Now, that was the per-ton actual cost of

(Testimony of C. Bruce Flick.)

manufacture, the actual tonnage. If we are to deduct the actual cost, or out-of-pocket cost from \$3.27 that we were willing to pay it would have left a profit of approximately over \$2 a ton, but I put this figure \$2.71 here to show, as I think your figures purport to show in this exhibit or document the witness is referring to, that the total cost, all the cost of these direct charges, or actual charges of \$1.19, plus all your allocated charges and overhead charges, according to your claim, and according to your figures would amount to \$2.71 per ton, and that that would leave a net profit here of 56 cents a ton. The reason I illustrated it at the time was, as I remember it, at that time the defendant was threatening to close down the plant, because they could not operate at a [333] profit, or, rather, they were threatening to stop the production of gypsum because they could not produce that at a profit. I wanted to show they were making over \$2 profit even allowing all their overhead as a part of the price, they would still have a profit of 56 cents per ton. That was the only purpose that I had in putting the figures on the blackboard.

Mr. Rosenberg: Now, I will ask the witness whether it is true that if Westvaco accepted \$3.27 a ton for the gypsum and if it is true that its cost figure was \$2.71, that it would realize a profit of 56 cents per ton.

Mr. Bennett: I think that is a matter of arithmetic, your Honor.

The Court: We have an accountant here.

(Testimony of C. Bruce Flick.)

Mr. Bennett: Well, maybe it is my error, though.

Mr. Rosenberg: Yes, that is within the realm of possibility. That may be possible.

The Court: I think it is time to take a recess until two o'clock.

(A recess was taken until two o'clock p.m.)

Afternoon Session, December 12, 1947, 2:00 p.m.

### C. BRUCE FLICK

resumed the stand;

Cross-Examination (continued)

The Court: You may proceed.

Mr. Rosenberg: Will the reporter read the last question?

(Question read by the reporter.)

Mr. Bennett: I think I answered that question which I thought was addressed to me. If counsel wants the witness to answer it I have no objection.

The Court: Proceed.

A. (The Witness): At that time they were talking of discontinuing the production and the profit figure based on direct charges would be the difference between \$3.27 and \$1.19, or \$2.08. If they quit making the gypsum they would give up \$2.08 a ton. The figures on the blackboard speak for themselves. If they received \$3.27 a ton and if the cost was \$2.71, which of course includes overhead allocations and all that, they would have what you would term a gross profit of 56 cents.

Q. What deductions would be taken off that 56 cents, if any?

(Testimony of C. Bruce Flick.)

A. I am not familiar with Westvaco's books, other than these figures we have got.

Q. Let me ask you this, if at the time this discussion took place when you were offering \$3.27 a ton for the gypsum, and if at that time our cost was \$2.71 per ton, and if we agreed [335] to accept \$3.27 a ton, do you think we would have realized a profit of 56 cents a ton from that time on?

A. I have no idea.

Q. Well, how much would your credit deductions amount to a year for the so-called deductions off the gypsum, how much is that amount?

Mr. Bennett: I object to that as wholly irrelevant.

The Court: If he knows he may answer.

A. (The Witness): I don't know how much our deductions would have amounted to.

Q. (Mr. Rosenberg): How much did it amount to for the 42-month period from September, 1944, until October, 1946?

A. I don't know.

Q. How much—do you have any approximate idea?

A. It would be expressing a guess.

Q. Would you question that it amounted to over \$8400?

A. I have no idea without looking the figures up. I would hesitate to say whether it is correct, or not, because I really don't know at this moment.

Q. Do you have your figures in court?

A. No.

Q. Assuming that the credit deductions that Pacific took for so-called deficiencies in gypsum

(Testimony of C. Bruce Flick.)

content was eight thousand odd dollars for a two-year period, that would materially affect the so-called profit of 56 cents on that blackboard, [336] wouldn't it?

Mr. Bennett: I want to interrupt to object because by virtue of the facts in this case no such figure is claimed. The figure now claimed, I think, as stated by counsel, was either the maximum of \$2100, or something of that kind, of which \$500 has been tendered, leaving in dispute a figure of something like fifteen or sixteen hundred dollars as being the amount in dispute as to the deficiencies for over-payment.

Mr. Rosenberg: Mr. Bennett, I am sure you know the amount you mentioned of \$2100 is not the total credit deductions taken by Pacific. Those are only the credit deductions which we questioned. There are a number of credit deductions which we do not question, but which we would have which would very definitely and positively reduce the net amount that we receive for our product. If we are charging \$2.98 a ton and you take off 20 cents a ton, we get \$2.78 a ton.

Mr. Bennett: I did not understand your question. I am sorry; you may answer.

A. (The Witness): Yes, because the price is per ton of gypsum, and under the contract when the gypsum falls below 95.51 percent gypsum value there is a charge-back provided for gypsum that falls below a particular point, then there is a charge-back.



(Testimony of C. Bruce Flick.)

Q. (Mr. Rosenberg): So you would be willing to concede, wouldn't you, in the normal course of operations, and just by the experience of the parties during the time this contract [337] has been in existence that if we got only \$3.27 a ton we would not realize 56 cents a ton profit, assuming the correctness of our information, of course, of \$2.71 a ton?

A. Yes, with just one qualification, that is, that we don't know what it cost to make gypsum of 95.51 percent purity, and what it cost to make gypsum that falls below that. It is possible that Westvaco does have some off-set that they can charge back for the inferior gypsum. It is possible there will be some off-set, I don't know.

Q. You have no reason to even suspect that it cost any less to make gypsum of 95.51 percent of gypsum content than it does to make gypsum of 90 percent?

A. I don't know. I remember Mr. Wallace told me on one occasion that if we did not insist on keeping the quality up they could turn out more gypsum. That would indicate to me there may be some relationship there.

Q. When did Mr. Wallace tell you that?

A. In one of our conversations.

Q. Which conversation?

A. I can't give you the date of it.

Q. You mentioned in your testimony yesterday that one of the things that you took into consideration in determining that gypsum was a by-product

(Testimony of C. Bruce Flick.)

was that under the contract it was sold for, I don't know whether you said \$2.98 or \$3.76, and magnesia, on the other hand, was selling for something like \$30 or \$40 a ton.

A. I believe I used the figure of magnesium oxide, \$46 a ton, and I believe I compared that with gypsum at the claimed price of \$4.36. In other words, one is worth 10 times as much as the other.

Q. That was a factor to which you gave consideration in arriving at your ultimate conclusion that gypsum was a by-product?

A. The basic reason for saying gypsum is a by-product is because it said so in the contract.

Q. What was that? Will you read the answer of the witness?

(The record was read by the reporter.)

Mr. Rosenberg: It says so in the contract?

A. And, furthermore, the characteristics are those typical of a by-product. In other words, you have to get the sulphate impurities out before you can get the main magnesia product, magnesium chloride, magnesium oxide.

Q. Is it or is it not true that one of the considerations that motivated your ultimate conclusion is the difference in the sales price between gypsum and magnesium oxide, as you said yesterday? I am not asking whether it was controlling. Is that one of the factors to which you gave consideration?

A. That is a factor in considering whether an item is a by-product. In this case, the gypsum was a valueless waste before processing.

(Testimony of C. Bruce Flick.)

Q. On what do you base that? [339]

A. Dr. Seaton described it as such.

Q. What did he say? Can you tell me what he said?

A. Dr. Seaton said, if I remember his words, this by-product gypsum would be a valueless waste if it were not for the favorable location here, which enables us to make something out of it.

Q. Is this the remark to which you refer: "The by-product gypsum from the process, through the operation of favorable location factors is marketable at a profit instead of being a valueless waste."

A. That's right.

Q. You construe that to mean that it is a valueless waste?

A. It would be a valueless waste if it were not processed and sold to Pacific Portland Cement Company under this contract. They dumped it in the bay for two weeks.

Q. How much would magnesium chloride be worth if we dumped it in the bay?

A. You can tell me that.

Q. You are the expert.

A. I am not an expert on magnesium chloride. I know the process there calls for magnesium oxide as the major product, and gypsum is the by-product.

Q. Did you have anything to do with the preparation of this chart?      A. Yes.

Q. You tell me what use would magnesium chloride be which you [340] designated on here as the primary product if it was not processed?

(Testimony of C. Bruce Flick.)

Mr. Bennett: That is a misstatement of counsel. He does not designate magnesium chloride as a primary product. The chart designates it——

Mr. Rosenberg: Oh, all right; I am sorry.

Mr. Bennett: It comes down here to another and further processing producing the end product, magnesium oxide.

Mr. Rosenberg: Let me ask this question, if you ran the magnesium chloride in the bay it wouldn't have any more value than the gypsum would have if you ran it into the bay?

A. If you ran the magnesium chloride into the bay the magnesium chloride in the bay would have no value.

Q. To get back, I believe you said one of the factors, not the controlling factor, but one of the factors to which you gave consideration in determining that gypsum is a by-product is the fact that gypsum, under our contract, is sold at a certain price, and magnesium oxide, I believe you said, was selling at about \$46 a ton?           A. Yes.

Q. How much has Pacific been selling this gypsum for during the term of this contract?

Mr. Bennett: We will object to that as incompetent, irrelevant, and immaterial, and not proper cross-examination, and the further reason that it involves obviously a trade secret [341] of the plaintiff that can have no possible bearing in this case. Your Honor recalls that we sought to inquire as to books and accounts of the defendant to ascertain the basis on which allocations were made, and im-



(Testimony of C. Bruce Flick.)

mediately the objection was raised, which was again stated here, that that would involve the price paid for the product and that would embrace their—let me state it this way, it would involve the consideration for which products were sold, the price for which products were sold to customers. It is wholly immaterial, and aside from any possible issue in this case, as to what Pacific sells any of the gypsum that they bought for. After all, these people are competitors of Pacific. The revealing of matters of that kind is not a proper subject in this kind of litigation, the revelation of a trade secret. I submit the matter is wholly unrelated. I submit they should not be permitted to go into something that is wholly irrelevant to any issue involved. For example, this witness's testimony on direct examination—I say there is a greater reason for that, they have denied us access to the books requiring us to hire an accountant who would be pledged to keep secret and confidential certain of these things included in the very matter which is the subject of this case. I submit this case and the testimony of the witness so far does not entitle the defendant to go into a matter of that kind. It can only be designed for the purpose of perhaps creating some situation showing where they are selling the gypsum. [342]

Mr. Rosenberg: In the first place, certainly this has some relevancy. You can see the display that is made on this blackboard in an attempt to show, and that is not factually correct, it has been stated so



(Testimony of C. Bruce Flick.)

by the witness. However, we know from this that we accepted a price which was around 80 cents a ton less than we are entitled to under the contract, but as far as it not being within the scope of the direct, the witness just testified that one of the motivations considered which led to his conclusion as to the status of this product as either a main product, a joint product, or a by-product was the difference in value as between that product and other products that we produce.

The Court: The court is prepared to rule. Both sides had an equal opportunity to be heard.

Mr. Bennett: I don't want to prolong argument if your Honor does not wish it. There was one statement I wished to correct.

The Court: Read the question.

(The record was read by the reporter.)

The Court: Overruled.

A. (The Witness): Pacific has resold the gypsum at various prices. It is difficult to strike an average. Pacific has also used the gypsum in its own operations and in order to determine what the average price would be it would require a great deal of accounting and computing to get at that. As you know, we have a gypsum plant at Gerlach, Nevada. Naturally, [343] we synchronize our Gerlach, Nevada gypsum operation with this source of supply. This is an adjunct to our gypsum division, so that the two are operated to best advantage together, naturally. We may at times serve certain

(Testimony of C. Bruce Flick.)

trade from Gerlach and other times we may serve the same trade from Westvaco.

The Court: At the market price of gypsum from time to time?

A. Yes. I might say this, that gypsum, as cement retarder, it is not one of the most important ones for this particular gypsum we sell at our Gerlach, Nevada, plant, at 3.50 a ton at the present time. That gives you some idea of the manufacture the value to the manufacturer at his plant.

Q. (Mr. Rosenberg): Mr. Flick, is that mined gypsum? A. That's right.

Q. Permanente has been your biggest customer for the gypsum that you have been buying from Westvaco, hasn't it?

A. Do I have to disclose that?

Mr. Rosenberg: Well, we know that.

Mr. Bennett: I don't think the witness——

Mr. Rosenberg: Withdraw the question.

Mr. Bennett: Let me say one more word. Counsel says the pertinency of this line of cross-examination is caused by what I illustrated as to their product. The only reason I did that, your Honor, was because——

Mr. Rosenberg: That is not true.

Mr. Bennett: Let me finish. I think the court will realize [344] what it was. I did it because it did not involve any question of business secrets. The witness testified, I am sure your Honor will recall, that Mr. Williams, or somebody from the defendant, had said they were going to shut down

(Testimony of C. Bruce Flick.)

their gypsum operations because unless we increased the price to 3.27 they could not operate at a profit. We wish to show that statement by Mr. Williams was false. That was the sole and only purpose of it, and I submit, your Honor, this shows it because the witness says the actual out-of-pocket expense even according to their figures, would amount to 1.19 a ton. The price we are willing to pay was 3.27, less some deductions here and there. I will show that from the figures later on, it wouldn't be a substantial deduction as related to price per ton. This was all done for the purpose of showing that that statement by Mr. Williams was not correct.

I submit that that does not offer any basis to permit this defendant to refuse to give us information which the contract said we would have the right to, because it would be, it would involve confidential trade secrets, which objection your Honor upheld here. To permit, under the guise of cross-examination, the revelation of private business secrets of this concern wholly unrelated to any issue here, and wholly unrelated to anything this witness testified to on direct examination, I submit, your Honor, is not only improper, but highly prejudicial. It is permitting the very people who your Honor said we should not be permitted to have information from——

The Court: What did I deny you?

Mr. Bennett: You denied us the right to go down and examine, for Mr. Flick to go down and make an examination of the books and accounts of

(Testimony of C. Bruce Flick.)

the defendant in this case for the purpose of determining——

The Court: The record already discloses that you went down there.

Mr. Bennett: The record also discloses——

The Court: Am I in error on that?

Mr. Bennett: We went down, your Honor, but we were not permitted to see all of their books.

The Court: What books?

Mr. Bennett: The books that were involved in the motions before your Honor. Your Honor recalls it.

The Court: I recall that, but I want to know what you were denied by any order of the court.

Mr. Bennett: Well, I will let the witness describe that.

The Court: No. You are addressing the court. You made a statement here that I denied you an examination of those books. I want to know in what respect I did that.

Mr. Bennett: I was not the one who presented that motion, but I can relate it perhaps indirectly. Mr. Kaapeke was the one who presented the motion.

The Court: Step forward. [346]

Mr. Kaapeke: Your Honor, at the argument of those motions Mr. Rosenberg and I argued at some length, I believe——

The Court: Let me refresh your memory, or perhaps it is my memory that is failing. The first time I suggested you get together, did I not?

Mr. Kaapeke: Yes, that's right.

(Testimony of C. Bruce Flick.)

The Court: You left, and you came in again on second motions.

Mr. Kaapcke: No. The next motion was Mr. Rosenberg's.

The Court: Well, what happened to that?

Mr. Kaapcke: That was granted.

Mr. Rosenberg: That had no reference to our records.

Mr. Kaapcke: If I could go back a minute, I would like you to bear with me a moment.

The Court: All right.

Mr. Kaapcke: Mr. Rosenberg and I argued at some length and your Honor said, and I recall your words, because they startled me, "The motions and each of them will be denied."

The Court: What were the motions?

Mr. Kaapcke: The motions were for an order to inspect their records and an order further to answer interrogatories.

The Court: Wait a minute. The books were denied in what respect?

Mr. Kaapcke: Because these people have many allocations and in order to check the accuracy of those allocations, if [347] there should be any propriety in checking items we must have not only the data as to the gypsum, allocation factors that related to gypsum, but the allocation factors that related to the other products.

The Court: What other products?

Mr. Kaapcke: Well, magnesium oxide and other chemicals, to ascertain the allocations as being



(Testimony of C. Bruce Flick.)

made between those two. When your Honor used the words that I just described, I asked your Honor, there was discussion about getting together, and I asked your Honor if you would retain the motion on the calendar until we saw whether we might get together on that.

The Court: Yes.

Mr. Kaapcke: Then Mr. Rosenberg and I began to discuss whether we could get together on what he could furnish. Then always as a basis for that discussion was the underlying reservation by him that these people were really competitors, competitive companies, and trade secrets were the things that we would not be permitted to see.

Now, there was the matter of sending an experienced certified public accountant down there to check these things that we, ourselves, may not see, and on that basis we decided that we could not pursue that course, among other things the cost of hiring an outside accountant to do that was inordinate to the purpose in mind, and it was not done. We then prepared and submitted to Mr. Rosenberg with no concession that we were [348] accepting the information without question these accounting sheets and the data that appears upon them, those accounting sheets.

In this matter that we described we were, as your Honor will see, deprived of the opportunity to look at their books for verifying these things we have been furnished, and also the data as to other products, their sales of magnesia, the price of sales to

(Testimony of C. Bruce Flick.)

other people, their percentage of product that was purchased and how much they paid for it. We were not given access to it, and those things were unavailable to us.

The Court: I will hear from counsel.

Mr. Rosenberg: I think counsel's statement is substantially correct. In other words, the court did not deny the motion. The court stated or suggested we see if we could get together. The only reason the court considered denying the motion was that I represented in court that any particular product they were entitled to see was these records relating to gypsum, and they wanted to go into all of the records regardless, the production and sales of all of our products, and I had no objection to them having that evidence, but I did not think it should be obtained in that manner, and in the course of discussion between counsel that morning I said, "You can go into our books and see anything you want that relates to the production of gypsum, and I will consent that an experienced certified public accountant go into the records of our tonnage production of all the products and certify to the ultimate [349] figures which will give you the information you want without disclosing that what we consider confidential." So I would say they were offered full access to our books as to anything that would relate to this litigation. They decided that the matter of having a certified public accountant would be too costly and would I, if they gave me forms on which they were to outline in blank in-

(Testimony of C. Bruce Flick.)

formation wanted, would I furnish that in lieu of them making an inspection of our records. I told them that I would, and we did it. On November 24th I sent over to Pillsbury, Madison & Sutro a letter in which I stated, "I am enclosing herewith" (reading letter).

They got the information, they still have it, and I have never received any response from them referring to my statement that it was furnished in satisfaction of the motion. [350]

The Court: I am going to ask you the direct question now so we will have a record: What books were they denied?

Mr. Rosenberg: The only books of which I know to which they were denied access, if the Court please, are the records showing our production figures and our sales figures on products other than gypsum. We did offer to let any recognized or, I guess, any certified public accountant, because that carries with it the stamp of reputability, go in and get out the figures. All they were interested in were the aggregate figures. They were not interested in who we sold to or how much, and we offered to permit them to get that through a certified public accountant, through a certified statement; so I would say they have not been denied access to any records that they require in order to fully check the accuracy and the propriety of our bookkeeping records.

Mr. Bennett: If Your Honor please, may I say something on that, and I will ask counsel the ques-

(Testimony of C. Bruce Flick.)

tion: Counsel, it is true you have refused our request as to the price you paid for your bittern, have you not?

Mr. Rosenberg: I can't answer that, Mr. Bennett. I do not know it to be true.

Mr. Bennett: Will you give us at this time the price that you paid for your bittern?

Mr. Rosenberg: If the Court considers it relevant, certainly we will, but there is no controversy involved in any of [351] these price increases over the cost of the bittern. In other words, in none of our price increases, if the Court please, has the cost of the bittern entered into the increase, so that that can be nothing other than a curious desire to see the terms of a private contract that we have with the Leslie Salt people. So if the Court feels they are entitled to it, of course, we would have no alternative. We would prefer not. We do not see any sense in going into records that won't shed any light on the issues involved in this litigation.

Mr. Bennett: Do you mean you withdraw this question of the witness?

Mr. Rosenberg: No, I am not withdrawing anything because you have placed it on a completely fallacious basis. You are implying to the Court that I am using as a foundation for my question the fact that you purported to compute our profit, and I think I have clearly stated to the Court that the basis for my question is that the witness in his direct examination said that one of the considerations that motivated his conclusion that gypsum is



(Testimony of C. Bruce Flick.)

a by-product is the difference between the market value of the gypsum and the market value of our magnesium products. And so I am asking the very concern that creates the market on this manufactured gypsum to tell me what they were selling the gypsum for.

Mr. Bennett: In the first place, Your Honor, that is wholly irrelevant because the contract sets the price of it. [352] We are not concerned with the market price of gypsum necessarily, except we have a contract price here and there is no contention that the contract price—you do not contend that the market price of gypsum is as much as the market price of magnesium sulphate, do you, or magnesium oxide?

The Court: The Court is prepared to rule, gentlemen. If you take a check of our procedure here, you will find that we are utilizing too much time entirely in argument.

Mr. Bennett: We may, Your Honor, but, I think, Your Honor, it is an important thing.

The Court: I will have to try and determine that.

Mr. Bennett: I wanted Your Honor to, but I wanted Your Honor to determine it with at least as full an understanding as counsel could give it to you.

The Court: I went through this, and I allowed some latitude. I understand exactly what happened at most appearances here and the circumstances surrounding the matter. I have a very vivid recol-



(Testimony of C. Bruce Flick.)

lection of it. I exhausted every effort I had to get the parties together. They did get together, finally compromising on sending an accountant out there. That is the last I heard.

Mr. Bennett: We did not send an accountant.

The Court: I have no control over that. The Court is prepared to rule. Proceed.

Q. (Mr. Rosenberg): Is this true, Mr. Flick, that the [353] great bulk of the gypsum that you purchased from Westvaco Chlorine Products Company has in turn been resold by Pacific Portland Cement Company to the Permanente Company for use as a cement retarder?

A. A substantial part of it has been resold to Permanente for use as a cement retarder. It has varied from time to time.

Q. What has been the price range of the prices which Permanente has paid you for the gypsum you have purchased from Westvaco for use as a cement retarder?

Mr. Bennett: I object to that question on the ground it is incompetent, irrelevant and immaterial, not proper cross examination and highly prejudicial to the plaintiff in that it will result, if allowed, in the revealing of a matter that is a confidential trade secret, disadvantageous to the plaintiff to be revealed, and without any relevancy at all to any issue involved in this case.

Mr. Rosenberg: I will withdraw that question for a moment and put it this way to see how confidential the information is.

(Testimony of C. Bruce Flick.)

Q. Is it true, Mr. Flick, that the price that Permanente was paying to Pacific Portland Cement Company for this gypsum in October, 1946, was \$6.83 a ton?

Mr. Bennett: Same objection, Your Honor.

The Court: The objection is overruled. You may answer.

A. Did you say \$6.96?

Q. (Mr. Rosenberg): \$6.83. [354]

A. At \$6.83?

Q. Yes. A. In October, 1946?

Q. Yes.

A. Well, I would really have to check the records to verify that figure, Mr. Rosenberg. I am sorry I do not remember it accurately.

Q. Have there been frequent changes in the price of gypsum to Permanente?

A. I wouldn't say there had been frequent changes, no. You will recall that during the period of OPA price control, maximum prices were frozen and there was no change at all.

Q. What was the freeze price to Permanente?

A. The freeze price, as I remember it, was \$4.98.

Q. And then what is your best recollection of the price since the freeze?

A. The gypsum was decontrolled as cement retarder on September 4, and I believe the figure \$6.78 comes to my mind.

Q. So that during the time that you were buying it from Westvaco at \$2.98 you were selling it for \$4.98, is that it?

(Testimony of C. Bruce Flick.)

A. \$4.98 less a two per cent cash discount. I believe.

Q. And this gypsum that goes to Permanente is shipped upon your shipping instructions directly from the Westvaco plant to Permanente, is that true?

A. That is true. It is loaded bulk on board cars at Newark [355] and shipped direct to Permanente if it is sold to Permanente.

Q. Throughout the recent period of the contract, a very substantial part of the total gypsum purchased by Pacific from Westvaco has gone to Permanente, isn't that true?

Mr. Bennett: If Your Honor please, just so the record is clear, my objection, as I understand, runs through this whole line of questioning?

The Court: Let the record so show.

Q. (Mr. Rosenberg): That is true, isn't it, Mr. Flick?

A. A substantial portion, yes.

Q. And that gypsum your people never see, never handle, never touch, is that right?

A. Never see, never handle, never touch—that is correct.

Q. Tell me this as to the gypsum that you take delivery on from us—and when I speak of “us” I mean Westvaco—for use in your plant, the Pacific Portland Cement Company plant, that comes in in box cars, does it?

A. I think it does. I would not be sure at the moment whether it is always box cars or gondolas.

(Testimony of C. Bruce Flick.)

It is in bulk at any rate. It is in bulk in freight cars.

Q. It is in bulk in freight cars, and then how is that product used by Pacific? Is it dumped in a storage place or is it used directly out of the cars or is it fed from the cars into a production line? How does Pacific use that product? Can you tell me that? [356]

A. I believe that they first have to unload the cars into storage and then it is used by Pacific for cement retarder. It may be used by Pacific for agricultural gypsum. Those are the main uses: agricultural and cement retarder.

Q. And you keep that gypsum separate and apart from your mined gypsum, I presume, do you?

A. Well, I do not know whether there is a physical separation deliberately or necessarily. It comes in from a different source, and I think, as a matter, they probably have separate bins.

Q. Do you have any idea how much the average amount of this manufactured gypsum that you buy from Westvaco that Pacific has on hand in storage?

A. No, I really don't. I would say it would not be a very large amount.

Q. What do you mean by a very large amount?

A. Oh, 500 tons maybe, somewhere in there. I really don't know. But I do know there is no great quantity of a thing of that sort stored.

(Testimony of C. Bruce Flick.)

Q. Do you think you might have as much as 500 tons on hand?

A. It could be. Could be.

Q. That would be about 10 carloads?

A. I am just guessing, really.

Q. I mean, if your guess is right.

A. 500 tons would be about 10 cars, but I really do not know. [357] I hesitate to use figures like that.

Mr. Bennett: May I ask the purpose of this line of examination, both as to the price at which Pacific sold this gypsum to Permanente and the quantities stored at the Pacific plant at Redwood City? I ask that because I may want to make a motion to strike the answer, Your Honor.

Mr. Rosenberg: I think I stated the purpose of asking for the price.

Mr. Bennett: No I do, not know yet. Is it the purpose to establish a market price for gypsum or is it designed for the purpose merely to show that we got a profit from this gypsum?

Mr. Rosenberg: Well, let us say it is for the same purpose that you put here on the board, that our total cost is \$1.19 and we are asking for \$3.77.

Mr. Bennett: Then I move to strike it out, Your Honor, on the ground that it does not prove anything of the kind. The only thing that it could prove at all is that Pacific sold their gypsum at a profit. Now, that is something wholly irrelevant to this case. The only thing it could be offered to serve for is to let Your Honor see we made



(Testimony of C. Bruce Flick.)

a profit and for that reason we ought to pay their price, and the fact is whether or not we made a profit, a dime or ten dollars per ton, has nothing to do with this case whatsoever. This court is to decide law questions here upon legal principles and not upon any basis, well, the plaintiffs are making a profit out of the [358] sale of this gypsum: therefore they ought to give some more money even though the contract does not require it. Counsel should have answered that question.

Mr. Rosenberg: I have answered it, counsel.

Mr. Bennett: I move to strike the answer, if Your Honor please.

The Court: I am glad you gentlemen get along so well. The motion will be denied. Proceed with this case.

Q. (By Mr. Rosenberg): Mr. Flick, you mentioned you had a conference with Mr. Wallace, and I believe you said Mr. Williams in January, 1944, is that right? A. I believe so.

Q. At any rate, you wrote a letter to Dr. Seaton in New York—if I am correct, the date is March 11, 1944, Exhibit 8—to which Dr. Seaton replied and told you that he would be out here in April and he would talk to you at that time; do you recall that? A. Yes.

Q. And then you said that Dr. Seaton did come out and you had a conference with him, is that right? A. That is correct.

(Testimony of C. Bruce Flick.)

Q. Tell me what was discussed at that conversation you had with Dr Seaton

A. We discussed this whole question of the price to be paid for the gypsum and the accounts, the charges to the cost of [359] production of this gypsum, the Westvaco's accounting system, accounting methods, and we questioned how we might settle our differences and find a way to get along in the future, and so forth, a general sort of discussion.

Q. What was that?

A. There was a general discussion along those lines. We were covering the same ground that I had been over with Mr. Williams and Mr. Wallace.

Q. Do you have notes on that conference, as you do on all your other conferences?

A. I do not have notes on all my conferences. It is my custom to make notes when I think it is something worth having in the future.

Q. Did you make any notes on that particular conference?      A. I may have.

Q. Will you look and see?

A. I haven't them with me.

Q. Was Mr. Wallace present at that conference?

A. Yes.

Q. Was there any discussion at that time about the cancelation clause in the contract?

A. The cancelation clause?

Q. Yes, about possibly amending the contract to make the cancelation clause mutual so that Westvaco would have a cancelation privilege as well as Pacific. [360]

(Testimony of C. Bruce Flick.)

A. I do not remember specific discussion about the cancelation clause. There may have been. There was a good deal of general conversation about the escalator clause and the fact that Westvaco seemed to interpret it to work in only one direction, and we thought it ought fairly to work in both directions, and it seems to me it was in that connection that Dr. Seaton said, "Well, you have got a cancelation clause." I do not remember any particular discussion about the cancelation clause. There was a general discussion about the contract.

Q. Is this true, that in the course of that conversation you told Dr. Seaton that you thought that this escalator clause ought to be modified so that it would work down as well as upward and Dr. Seaton said, "Well, you have a cancelation clause that only works one way and perhaps if we can modify one we can modify both." Do you remember something of that sort?

A. I remember we discussed the escalator clause and the fact that we felt that it fairly ought to work in both directions, and that Dr. Seaton probably did say that, reminding us in that connection we had a cancelation clause. I remember very definitely Dr. Seaton's position that if we were going to talk about modifying the contract in any way, that it was his position that nothing whatever should be modified unless the entire contract were renegotiated from scratch. But nothing was done along these lines.

(Testimony of C. Bruce Flick.)

Q. Mr. Flick, is this true, that from the time that you [361] familiarized yourself with this contract and the transactions of the parties thereunder you understood that Pacific was entitled to no credit deductions on the shipments from Westvaco so long as the gypsum content equaled or exceeded 95.51 per cent, isn't that true?

A. That is correct. The contract provides for a deduction if the gypsum value falls below 95.51 per cent.

Q. From the time you went with the firm until late in 1944, Pacific did take credit deductions where the gypsum content fell below 97.51, although it exceeded 95.51, is that true?

A. There were a number of instances when such mistakes were made in the office and they have been tabulated and a check was tendered to Westvaco.

Q. When was that first brought to your attention?

A. Mr. Kaapcke in connection with this suit asked me about such deductions and whether we had made any deductions for anything other than the gypsum value percentage of whether we had made any deductions on account of the impurities, and I had a recheck made of the files, and we assembled all of these clerical errors as they were found, in instances where the clerk or clerk handling the thing have made such mistakes and issued credit memorandums and sent them a check, although we were advised by counsel that half the amount had outlawed; we nevertheless tendered a

(Testimony of C. Bruce Flick.)

check for the entire amount. It was a little over \$500. [362]

Q. Do you recall getting a letter from Mr. Watt in October, 1946, calling your attention to the fact that there was \$514 due for credit deductions that had been erroneously taken?

A. In 1946, when?

Q. The letter was dated October 31, 1946.

Mr. Bennett: Do you have the letter, counsel? I think if you have the letter it ought to be shown the witness.

Mr. Rosenberg: You have the original, Mr. Bennett.

Q. (By the Court): Do you recall such a letter?

A. At that time I remember Westvaco was asserting total claims of over \$11,000, as I remember it, on the differences and disputes over these specifications chargebacks and there well may have been such a letter. It seems to me they had the account divided into two or three parts and I told Mr. Wallace if he would show me where we were wrong we would be able to check it and correct it if we were wrong.

Q. (By Mr. Rosenberg): Mr. Flick, you visited the plant at Westvaco on a number of occasions, have you?

A. Not on a number of occasions. I have been down there several times.

Q. You have been down there when the bromine plant was operating, have you?



(Testimony of C. Bruce Flick.)

A. I was there in January, 1944, for the first time, and I am quite sure the bromine plant was in operation at that time.

Q. Is this true, that there are in effect three plants [363] comprising the entire plant down there: the bromine plant, the gypsum plant and the magnesium plant? Would you say that that is true?

A. Well, I think there is also another plant, which is advertised for sale by the Defense Plant Corporation, which was at Newark, a part of the same general plant layout, isn't that true? The Rubber Reserve Corporation contract deal?

Q. I am talking of the regular—that was a war plant, wasn't it?      A. Yes.

Q. I am talking of the regular chemical plant the Westvaco had at Newark, California.

A. Yes. Now, what else may have been there I do not know.

Q. Other than what? I asked you isn't it true——

A. The plant may have included other units besides magnesium oxide, bromine and gypsum. I really do not know because I was never interested in the plant as a whole. I do not think I was ever shown the plant as a whole.

Q. (By the Court): He wants to know if those units existed down there at that time.

A. At that time those units did exist.

Q. (By Mr. Rosenberg): Was it explained to you, and you observed, didn't you, that the bittern

(Testimony of C. Bruce Flick.)

goes first to the bromine plant and the bromine is extracted, is that right?

A. That was my understanding. [364]

Q. And then the bittern goes to gypsum plant and the gypsum was taken out? A. Yes.

Q. And then the residue goes to the magnesium plant and the magnesia is extracted, is that right?

A. Yes, that chart shows it, as I understand it.

Q. That does not show the bromine operation, does it?

A. Well, the bromine operation, as I understand, has been discontinued.

Q. Do you know how many products are made down there at that plant, how many finished products by Westvaco at the Newark plant?

A. Well, as I have told you, I know the bromine and magnesium oxide and gypsum plants were there. Now, what else there may have been, like this Rubber Reserve plant, I really do not know.

Q. No. I am just speaking of those three plants.

A. I do not know.

Q. You do not know?

A. I know magnesium oxide is produced, Your Honor, in the form of what is called periclase, which is about 90 per cent magnesium oxide. I do not know what the total roster of Westvaco's products might be.

Q. In other words, this magnesium oxide, that is merely a chemical term, but the actual commercial product that comes out of the plant is in numerous and various forms, isn't it? [365]

(Testimony of C. Bruce Flick.)

A. I do not know.

Q. You do not know?

A. I understood that periclase was certainly the chief product.

Q. Let me ask you this: I believe you stated—if I am incorrect you tell me—that one of the considerations which cause you to conclude that gypsum is a byproduct is that the quantity of gypsum produced is dependent upon the quantity of the magnesium oxide that is produced, is that right?

A. That is a consideration, a definite characteristic of a byproduct is that it is something which is produced incidental to the production of the main product, and oftentimes as a result of removing an impurity from the main product or removing, in examples we have used, the hull of the pineapple or taking the pits out of the peaches and what not. In this case, I understand that the gypsum results from removing the sulphate impurities.

Q. And your assumption is that the removal of the gypsum is incidental to the ultimate production of the magnesium oxide, isn't that correct?

A. I understand that if you do not get those sulphates out you won't get a pure magnesium oxide.

Q. And that the gypsum is produced as an incidental operation in the manufacture of what I presume you would call the main product, magnesium oxide, isn't that right?

A. You have to get the sulphates out, and you get them out by [366] means of precipitating the gypsum.

(Testimony of C. Bruce Flick.)

Q. And therefore you have assumed and conclude that the amount of gypsum that you produce is dependent upon the amount of the main product, as you call it, magnesium oxide that is produced, is that true?

A. Let me put it this way: The amount of gypsum that is produced, as I understand it, is dependent upon the amount of sulphate that you have got to get out and the amount of sulphate that you have to get out is dependent on the quantity of bittern you process, and in 1943 I understood that Westvaco changed from using calcined shells, to make the calcium hydroxide shown in the lower left corner of the chart, and used a calcine dolomite, which contains a substantial portion of magnesium, and when they made that change they could get their magnesium oxide with less bittern water, therefore less sulphates to be removed, and therefore our tonnage of gypsum dropped 7,500 tons or 23 per cent in the year 1943. That shows the byproduct nature.

The Court: We will take a recess.

(Recess.) [367]

Q. (By Mr. Rosenberg): Mr. Flick, I just want this in the record in a general way; it is true, is it not, that in taking these credit deductions under the provisions of paragraph 5 of the contract Pacific likewise has taken deductions on a fractional basis when the gypsum content fell below 95.51: in other words, if the gypsum content fell below 95.51 you—and in those instances also where Pacific took

(Testimony of C. Bruce Flick.)

credit where it was above 95.51, you would take credit for that at the rate of 10 cents per ton or fractional part thereof for each per cent or fractional part that the gypsum content fell below 95.51 per cent?

A. I believe you stated that correctly. We have followed the percentage below 95.51—let us say it is  $11\frac{1}{2}$  per cent below. Ten at 10 cents a ton you would multiply by  $11\frac{1}{2}$  per cent.

Q. I think you are mistaken.

A. I believe you said what we do.

The Court: In the event it went the other way.

A. You are not entitled to any deduction above, Your Honor. Only if it falls below 95.51—if it was 94.51, then you would be 1 per cent below and we would charge 10 cents a ton.

Mr. Rosenberg: Let me ask this question: If it falls under 94.51 per cent you charge 10 cents a ton for the 3 per cent that it falls below 97.51?

A. Yes.

Q. And although it may surprise the Court, we don't question [368] the correctness of that—the contract provides that we have a 2 per cent tolerance, but if we exceed that 2 per cent, they are entitled to 10 cents per ton credit for each per cent that the gypsum content falls below the chemical content of 97.51. The only difference between us in that respect is we question their right to take fractional parts and Pacific is claiming the right to take fractional parts.

The Witness: That's right.



(Testimony of C. Bruce Flick.)

May I correct—I am not familiar with the procedure, but I would like to correct an answer I made just before the recess.

Q. All right.

A. With respect to the word “residue.” You asked me about after we took, after the gypsum was taken out and the residue going on to the magnesium oxide process, I believe I said yes. I don’t mean to use that word “residue”——

Q. No, I understand.

A. ——because it is not residue but it has magnesium chloride in it from which the major product magnesium oxide is obtained in the next step. I want to correct that word residue.

Q. What you meant is the fluid remaining after this gypsum is extracted goes on to——

A. The fluid containing the magnesium chloride is the thing from which the magnesium oxide is obtained in the next stage. [369]

Q. In other words, at this point the magnesium sulphate which is a bittern water——

A. It is not the bittern itself, it is in the water.

Q. It is in there. Calcium chloride is added and the gypsum is taken off; is that right?

A. When you add calcium chloride to magnesium sulphate, both those chemical compounds break down and recombine or regroup, so that you then have magnesium chloride and calcium sulphate.

Q. This is the fluid that goes on into the chemical plant from which the magnesia is extracted (indicating on diagram).

(Testimony of C. Bruce Flick.)

Mr. Bennett: When you say "this"—

Mr. Rosenberg: The magnesium chloride—

A. (The Witness): Magnesium chloride is in the fluid that goes on to the next stage.

Q. Assuming that we would discontinue the process at this point for the reason there was no market for magnesium products and we discontinued the process at the point where the gypsum is taken off. Would you still consider gypsum to be a by-product?

A. If gypsum were then the only product, obviously it could not be a by-product, but you would not do that because you could not afford it.

Q. Well, that would depend on the price of gypsum as to whether we could afford it.

A. I hope it does not go that high.

Q. As I understood your testimony yesterday, you stated that [370] one of the reasons why, in your expert opinion, overhead is not properly chargeable to a by-product is that if you discontinue the processing of the by-product, the overhead would continue and it would be impossible to directly ascertain the overhead charges that were caused by the processing of the gypsum. Is that true? Let me read your testimony. This is what you said:

"Now we come to indirect or overhead charges. Those charges, those overhead charges which you would have anyway, whether you processed the material or whether you dump it in the Bay, those charges which you cannot directly ascertain were

(Testimony of C. Bruce Flick.)

caused by this processing of that by-product, those charges are not properly chargeable."

Do you recall giving that testimony?

A. Yes; I think that is a very good statement.

Q. If I understand that testimony, one of the reasons why you said that, in your expert opinion, and as a matter of good accounting, it is not proper to charge overhead expense to processing of a so-called by-product, is that if you did not process the by-product, the overhead would continue anyway and it would be impossible to determine how much of the overhead charge directly attributable to the processing of the by-product; is that a correct statement?

A. Correct.

Q. Wouldn't that same principle apply in the case of a joint [371] product?

A. No.

Q. Let me put it in this manner: If you are making four joint products in a plant and as you have stated before you charge certain charges which you allocated as overhead and which can not be directly attributable to the various products that you manufacture and because of unprofitableness you discontinued the manufacture of one of those products, your overhead would continue, would it not?

A. Yes, but the situation is entirely different. Let me explain, in the case of joint products—let's go back to our Gerlach, Nevada plant where we have four products, we call joint products. If you discontinue one of the four products then you have three joint products. Now, at this plant if you dis-

(Testimony of C. Bruce Flick.)

continue drying, grinding and shipping this by-product material which comes off the filter, it is the filter cake, and you throw it into the Bay, why, you still are making your major products. The essential difference in accounting between by-product and joint product is that characteristic of the by-product: it is a valueless waste until you have processed it and put it in form where you can get something for it.

Q. Is that true of any raw material?

A. No.

Q. For all practical purposes? A. No.

Q. It is a valueless waste? A. No.

Q. Until you make something marketable out of it?

A. No. Our gypsum, as we get it from the quarry is not at that stage a valueless waste.

Q. Where does it change the logic of your accounting? Let me ask this: Is this true, that if you discontinue in your Gerlach plant one of the four products that you are making, you would continue to have overhead expense.

A. You would then have three joint products and you would spread against those three joint products the cost of making your three products. Now, I don't want to quibble over the word "overhead", but I presume you are talking now about charges right at that plant.

Q. That's right. Then if you were only making three products the overhead that you had before to spread against four products, you have to spread it over the three products. A. Sure.

(Testimony of C. Bruce Flick.)

Q. Why is the philosophy or the rationale or logic any different in that case than in the case of a by-product, where does that change the logic?

A. There is a very definite difference in the logic. When we quarry the rock at Gerlach there is never a point at which that rock can be called a waste material. We crush the rock. Then we can make either agricultural gypsum or hard wall plaster [373] or stucco, or we manufacture the wall board, or we can sell it as a cement retarder. There is never at any stage anything that you can call a waste material. You don't have to pull anything, any impurity out of the rock. You don't have to peel anything off the rock. When you come to a typical by-product, and this is really the heart of the logic, your typical by-product is a material which is both incidental to the production of a major product and the by-product material typically a valueless waste until you have done something to it.

Let me answer this question further as to your by-product. One school of accounting says simply credit the proceeds of the sale of the by-product against the cost of the main product, but where you have to process the by-product you charge only what you are actually out of pocket to do what is necessary to give that waste material a market value. That is the logic underlying the accounting practice.

Q. Do you think there might be some distinction in cost accounting in a chemical plant as dis-



(Testimony of C. Bruce Flick.)

tinguished from other manufacturing operations where you start with something that has intrinsic value in itself, like gypsum, can you conceive of any difference in the treatment by reason of the difference in the nature of the industry?

A. I don't see any reason why there should be any different treatment in accounting for by-products in one kind of industry and another kind of industry. It does not hang on the kind of [374] industry. It hangs really on the nature of the by-product.

Q. You have been over at the plant. This is true, that the mother material in which all of these processes stem or from which they stem, is the bittern, isn't it? A. The mother material?

Q. Answer "yes" or "no".

A. I can not answer "yes" or "no" because the wording of the question, you say from which all these products stem.

Q. Yes.

A. The gypsum is not a product which stems from the mother material. The gypsum is an impurity in the mother material, it must be gotten out.

Q. It is in the mother material.

A. The sulphate is, the calcium part is not in the mother material.

Q. In all the processes at this plant they start with the bittern?

A. Yes. That is the first thing—

(Testimony of C. Bruce Flick.)

Q. And the bittern is nothing but salt water from which the Leslie Salt Company has precipitated the salt; isn't that right?

A. That is as I understand it. Under that precipitation and other chemical effects, it is concentrated bittern water and it reaches that condition in connection with the magnesium sulphate which is not characteristic, as I understand it, of the unconcentrated sea water. [375]

Q. Well, we start with the bittern, which is the sea water after the salt has been taken out.

A. I would call it concentrated sea water after the salt, most of the salt, has been taken out. There is still, I think, quite a bit of salt in it.

Q. As a matter of fact, that bittern itself is a sea water which the Leslie Salt Company produces?

A. I suppose you might call it so.

Q. Well, do you have any doubt about it?

A. I don't know anything about Leslie Salt Company's process.

Q. You are starting here with a material which is, you might say, a chemical substance from which a chemical plant is going to extract various chemical elements.

A. That is true, but I don't know why the word chemical has any magic. It is merely sea water.

Q. Well, I am impressed by the magic which you apply to the word "by-product". How do you figure—

A. I have explained that.

Mr. Bennett: Your Honor—

Mr. Rosenberg: I withdraw it. I withdraw the statement.

(Testimony of C. Bruce Flick.)

Q. So that the fact of the matter is that in the chemical operation of this kind you start with a mother material and then with the combination of other chemicals you extract various chemical elements from the material as it proceeds through the various processes; is that right? [376]

A. You start with the bittern water which contains two chemical compounds, two magnesia compounds, you have to do that in order to get magnesium oxide.

Q. Can't you just as well say that it also contains sulphates that you are anxious to get out as gypsum?

A. It contains an impurity which you must get rid of to get your magnesium oxide.

Q. It is a fact, is it not, there is quite a substantial physical plant over there that is devoted exclusively to the grinding, filtering and drying and processing of the gypsum; is that true?

A. Well, what you mean by the words "quite a substantial plant", I don't quite know.

The Court: Well, there are three units over there and one of the units is for gypsum.

A. That is true, your Honor. The gypsum unit is not a big unit in a manufacturing sense of the term.

The Court: In any event, there are three units and one is a gypsum tank, a gypsum unit.

A. Yes, your Honor.

Mr. Rosenberg: Q. Mr. Flick, I show you an article entitled "Bromide, Lime, Magnesia, Gyp-

(Testimony of C. Bruce Flick.)

sum." The article is from the "Pacific Chemical and Metallurgical Industry," October 1938. It is divided into four sections. The first one is bromide. The second one is lime. The third one is magnesia [377] and the fourth is gypsum. I direct your attention to these pictures opposite the article on gypsum. Do you recognize that as being the gypsum plant of the Westvaco Chloride Products Corporation at Newark, California?

A. I can not tell from these pictures. It might be most any kind of plant. The tanks in the middle look like the slurry tanks at Permanente. I am sorry, I can not identify industrial pictures like that.

Q. But you have seen the plant there. There are precipitation tanks, there are mixers, there is a grinding machine, there is a filter and there is a drying kiln; is that right?

A. The precipitation tank, you have described certain pieces of equipment, they are not all part of the gypsum unit.

Q. Well, the tanks are tanks in which the gypsum is precipitated?

A. As I understand it, they are tanks in which this liquid sort of settles and the chemical reaction goes on, it is in the tank and there is air bubble agitation and the result of all that is the gypsum crystals do form in those tanks and then it has to be filtered out for a complete separation of gypsum from the stream containing the magnesium chloride that goes on into the next stage of the manufacture of the magnesium oxide.

(Testimony of C. Bruce Flick.)

Q. Then there is equipment there for the purpose of conveying the dry gypsum from the drier over to the warehouse or to the cars for shipment?

A. Yes. You have to have conveyors, I think there is a drier, a grinder and one piece of equipment, as I remember it, one of the Raymond Kiln mills.

Q. Over to the warehouse?

A. That's right, storage bins.

Q. Do I understand that you had any question in your mind that the depreciation charged on this equipment that is devoted exclusively to processing of gypsum is a proper item to be included in the cost of producing gypsum; do you question that?

A. I don't question that. I question the method of depreciation.

Q. What method of depreciation?

A. The straight line method.

Q. Who told you that we followed the straight line method?

A. Mr. Cuneo.

Q. When?

A. January 14, 1944.

Q. Is that in your notes of your conference?

A. Yes. Would you like to see it?

Mr. Rosenberg: Yes. [379]

A. I find it here, if you would like to look at it.

Q. Just tell me what he said.

A. This is my note under the heading of "Depreciation":

"Gypsum department equipment depreciated directly. Other equipment, such as compressors, et cetera, not directly allocable is charged in ratio of



(Testimony of C. Bruce Flick.)

the plant values which are directly allocable. Composite rate, straightline for entire plant spread to departments." And a further note on depreciation: "Depreciation detail to be obtained from New York."

Q. What is your objection to the determination of depreciation on that basis?

A. On the straight line basis?

Q. Yes, the composite rate.

A. The composite rate. Let us take them one at a time. May I discuss first the straight line?

Q. Yes.

A. The straight line method of depreciation is a method which assumes that a machine will have a certain useful life in terms of years. For example, if you think that a machine will last for ten years, then you write off each year one-tenth of the cost of the machine. In the case of this by-product gypsum, where you have a fluctuating tonnage, the annual depreciation remaining under such a method practically unchanged, if your tonnage drops, the per-ton charge goes up, as actually happened in these figures from 1942 to 1943, and the result of that is [380] that your price would go up under your escalator clause and you would pay an increased price for the remainder of the 25-year contract, because of that bookkeeping method adopted of straight line depreciation. Straight line depreciation does not reflect the actual wearing out of the machine. It is only a hypothetical or theoretical, convenient method of writing it off. Now, for this

(Testimony of C. Bruce Flick.)

purpose the correct method would be the production method to estimate how many tons of gypsum that machine should be good for, and then to divide the cost of the machine by the number of tons to be put through it, and arrive at a depreciation rate per ton.

Q. Do you have any way of knowing whether what you call the straight line depreciation has resulted in any higher rate of depreciation than would result in the tonnage method that you suggest we employed?

A. I have just told you it resulted in a 7-cent increase from 1942 to 1943, where if the depreciation were on a per-ton basis such an increase would not have appeared. There was no actual increase in the cost of manufacture of the by-product gypsum of 7 cents a ton in those two years. The machines did not wear out faster because less tonnage went through them. It is a bookkeeping thing that has a result that is apparent rather than real.

Q. That is a common method of determining depreciation, isn't it? [381]

A. Quite common. I merely point out that it does not work fairly here, or correctly, rather.

Q. Let us go into insurance. Do you question the propriety of including in cost of production the expense of insuring the plant that is devoted to the production of gypsum?

A. I will say "Yes," and then if I may explain my answer a little bit, I have taken the view, and

(Testimony of C. Bruce Flick.)

I believe I have expressed it, that in my opinion, by its nature—I am speaking now of property insurance, such as fire insurance—is that what you mean?

Q. Yes.

A. Fire insurance, for example, by its nature, is essentially protection to the company in case anything happens to the equipment and as a financial protection sort of item I do not believe that it should be included in actual cost of manufacture. But I am quite prepared to say that if the amount of fire insurance carried on those machines, that equipment, directly in the gypsum department, can be ascertained directly, that I would not quarrel over its inclusion.

Q. And I presume you would concede the same with reference to taxes that could be related to the equipment that was used in the production of gypsum, would you, property taxes?

A. Property taxes—again I feel that the best construction would be, inasmuch as taxes are levied by outside taxing authorities, you cannot control the amount of the assessment, [382] the tax rate, or anything else. I think they are a financial expense item rather than actual cost of manufacture. But, again, I would not battle very hard to say that you were entirely wrong if you included in the cost of the by-product those property taxes which you can actually ascertain to be levied against the equipment used in the production of that by-product. I do not think that is the best—

(Testimony of C. Bruce Flick.)

as I say, I really think it is a financial expense rather than an actual cost of manufacture. It is not directly related to drying, grinding and shipping gypsum.

Q. If you were called into a plant as an expert accountant and they asked you to tell them how much they had to sell their product for to operate at a profit, I think you would include taxes in your computations, as well as insurance and depreciation, wouldn't you?

Mr. Bennett: I object to that question because it is irrelevant and immaterial. The contract that we are dealing with here uses certain terms, "cost of production," and "actual advance in cost of manufacture." This question of counsel, as I understand it, has to do with profit, which according to his theory has all kinds of things in it, and as I said in my opening statement, what system might be designed by an individual for its own purposes to figure his gross, net, intervening or intermediate profit—

The Court: I think the question here is whether or not [383] the item of taxes is attributable to overhead expense. Is it or is it not?

Mr. Bennett: Whether it is attributable to overhead?

The Court: Yes.

Mr. Bennett: Any question your Honor asks, of course, I won't object to. But I did not understand that that was counsel's question.

The Court: I want to ask that.

(Testimony of C. Bruce Flick.)

The Witness: I believe that taxes are quite commonly looked upon as a part of overhead, although they are really a separate item, to-wit, taxes.

The Court: Q. And insurance the same?

A. Insurance likewise.

The Court: Let us proceed, gentlemen.

Mr. Rosenberg: Q. Referring your attention to Plaintiff's Exhibit 10, which is the letter of September 13, 1946, which is the notice of the increase of price to \$4.62—I believe you have testified that you received that and then shortly thereafter you sent Mr. Bannard over to Newark to inspect the records over there, is that right, Mr. Flick?

A. Yes.

Q. And then Mr. Bannard spent some time over there inspecting records, did he?

A. I think he spent several days.

Q. Then when he came back he reported back to you, did he? [384]

A. That is correct.

Q. When he came back did he show you a tabulation such as the one that I now hand to you, showing the derivation of that 86-cent increase in price?

A. He may have. I can't too definitely say, because he made working papers, and I reviewed with him his working papers, you see, and I may have seen this incident to that.

Q. Ultimately, after Mr. Bannard had conferred with Westvaco and then had consulted with you, and I believe you said that there was some further conferences had, were you ultimately given



(Testimony of C. Bruce Flick.)

a revised tabulation showing a 72-cent increase in cost of production, and a resulting price of \$4.48?

Mr. Bennett: You mean given by the defendant, your client, Westvaco?

Mr. Rosenberg: Yes.

Mr. Bennett: What you mean by that was—

Mr. Rosenberg: Was he furnished with this?

Mr. Bennett: The first claim, the first sheet that you showed the witness—

The Court: It was revised. This is the second.

Mr. Bennett: The claim, the basis of their 86-cent price increase—

The Court: It was revised to 72.

Mr. Bennett: The second sheet was a revised compilation of the same nature showing a reduction to 72 cents, both of [385] which sheets or documents were furnished by the defendant and represented the nature of their claim for the advance, is that right?

Mr. Rosenberg: That is right.

The Witness: I remember that there was at first a correction of 14 cents and this seems to reflect that. I can't be sure of all these detailed figures.

Mr. Rosenberg: Q. But you have a copy of that haven't you, Mr. Flick?

A. Probably. If Bannard had it, it is probably in his files. I remember that there was a correction of 14 cents after the initial increase.

Mr. Rosenberg: Is there any objection to this, Mr. Bennett?

Mr. Bennett: Not for the limited purpose of showing what you claimed.

(Testimony of C. Bruce Flick.)

The Court: Let it be marked and limited to that purpose, then.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

## DEFENDANT'S EXHIBIT C

### GYPSUM PRODUCTION COSTS

Production	July 1944—June 1945		July 1945—June 1946	
	Cost	Per Ton	Cost	Per Ton
	33,420 tons		36,658 tons	
Supervision	\$ 1,169.82	\$ .04	\$ 1,588.37	\$ .04
Operating Labor	10,622.12	.32	12,772.31	.35
Operating Materials	791.63	.02	1,790.28	.05
Repair Labor	7,101.88	.21	9,027.88	.25
Repair Materials	3,841.85	.11	7,438.34	.20
Truck & Tractor	85.41	....	.....	....
Miscellaneous	.....	....	9.00	....
Power	4,823.35	.14	5,216.83	.14
Fuel Oil	71.31	....	219.77	.01
Fuel Gas	3,246.42	.10	3,992.94	.11
Bittern	5,854.23	.18	5,794.88	.16
Sulphuric Acid	.....	....	12,979.42	.35
Water & Steam	513.29	.02	565.36	.02
<hr/>				
Total Direct	\$38,121.31	\$1.14	\$61,395.38	\$1.68
Overhead	24,957.64	.74	32,386.87	.88
Taxes, Insurance & Deprec.	13,918.54	.42	14,134.38	.39
I.D.C. Water Steam	259.26	.01	242.47	.01
<hr/>				
Total Mfg.	\$77,256.75	\$2.31	\$108,159.10	\$2.96
Loading & Shipping Expense	7,091.81	.21	10,427.61	.28
<hr/>				
Total	\$84,348.56	\$2.52	\$118,568.71	\$3.24*

\* Increase \$0.72.

(Testimony of C. Bruce Flick.)

Mr. Rosenberg: Q. You sent Mr. Bannard over after being notified of this 86-cent increase for the purpose of investigating the propriety of that increase, did you?

A. Looking at the figures to see whether it appeared to be supported.

Q. Did you give him any instructions as to what items he was [386] to allow or disallow? I mean did you give him any general instructions such as nothing but direct charges, or anything of that sort?

A. Bannard's job was not to allow or disallow anything. Bannard's job was to go down, look at the figures, and come back and tell me what he found.

Q. Wasn't it his job to make work sheets which would include adjustments that he felt should be made in the claimed increase cost of production? Wasn't that what he was supposed to do?

A. Bannard was thoroughly familiar with my position in respect to all of these accounts, and his job was to go down, look at the figures, and come back and report to me. Bannard was auditor, and by that time I had become vice-president.

Q. What I am trying to find out is this: Before he went over to Newark and inspected the records, did you tell him, "Now, look over those records and keep in mind that we claim under the contract there are to be only direct charges allowed in determining cost of production?" Did you tell him anything of that sort?

(Testimony of C. Bruce Flick.)

A. I let Bannard look at my notes from my previous examination and sent him down there to look at the figures and use his judgment. He was a certified public accountant, and I dependent on his judgment as to how far he was going to go in looking at the figures.

Q. At any rate, he did work up a work sheet on which he set [387] forth the items as set forth by Westvaco, for the period in question, and those that he approved and those which he objected to, did he not?

A. Whatever work sheet Bannard may have had did not represent any final judgment by Mr. Bannard as to what he approved or did not approve. His work sheets were to enable him to report to me.

Mr. Rosenberg (To Mr. Bennett): You know what this is (handing a document).

The Witness: If you want to know what Bannard approved, he approved my letter of November 4, 1946, which he read before I sent it.

Mr. Rosenberg: Q. You are a little ahead of me. You have a copy of this work sheet in your files, haven't you?

A. I must have if this is a photostatic copy of one of Bannard's work sheets.

Q. That is a sheet he prepared after he spent several days over at Newark going over the records over there, is it? A. Yes, sir.

Q. And that work sheet is based upon the figures comprising this 86-cent increase that was

(Testimony of C. Bruce Flick.)

ultimately modified down to 72 cents, isn't that right?      A. I think it must have been, yes.

Q. Where did he make this work sheet? Did he make it over at the plant, or after he got back and reported to you, do you [388] know?

A. I do not know.

Mr. Rosenberg: I will offer that in evidence, if the Court please.

The Court: Let it be admitted and marked.

Mr. Bennett: Your Honor, what is the purpose of it?

Mr. Rosenberg: The purpose of it is to show that after this—







(Testimony of C. Bruce Flick.)

(To the Witness): What was Mr. Bannard's position at that time?

The Witness: Mr. Bannard was auditor, working under me and responsible to me.

Mr. Rosenberg (Continuing): —that after the auditor made his investigation, setting forth in his work sheets the items to which he took exception, there is no exception taken to general overhead, and still on November 4, 1946, Mr. Flick wrote a letter, which is in evidence, in which he stated, "Items questioned by our auditor are as follows:" And one of the items that Mr. Flick said in this letter that his auditor questioned was general overhead, and his own work sheet is to the contrary.

Mr. Bennett: Your Honor, I do not see on this work sheet where any such conclusion is deductible. May I also say as part of my objection to your Honor, and basing it on the premise that counsel has stated, that it is incompetent, irrelevant and immaterial, and no proper or adequate foundation has been [389] laid, and it shows on its face that it does not include any such thing. The testimony of this witness offered to lay the foundation shows that Mr. Bannard did not have permission or the function of determining whether or not overhead should be included. That was a matter handled by Mr. Flick, and upon which Mr. Flick had unequivocally stated and addressed himself to the defendant and that Mr. Bannard's work was simply to gain and ascertain from the statements and records that were furnished to him by Mr. Williams,

(Testimony of C. Bruce Flick.)

or whoever it was in charge of the Westvaco plant, the figures that they claim constituted increased cost, the cost, and prepare the accounting data for Mr. Flick's information. Now, I do not see, even assuming that this particular work sheet does not contain any specific protest that overhead items should be disallowed, constitutes any evidence in this case upon any foundation that has been laid so far or apparent from the face of the document. For that reason it seems to me the document is inadmissible and does not serve nor can it serve the purpose for which counsel says it is being offered in evidence.

Mr. Rosenberg: I will submit that that probably goes to the weight of the evidence rather than its admissibility, if the Court please.

The Court: The objection in any event will be overruled. Note an exception.

Mr. Rosenberg: I see it is after four. Does your Honor [390] want to adjourn now?

The Court: We will adjourn this case to Tuesday, at ten o'clock, inasmuch as we have a law and motion calendar on Monday. That will give both sides a full opportunity to come in well prepared so we will not have any difficulty at all here.

(Thereupon an adjournment was taken until Tuesday, December 16, 1947, at 10:00 o'clock a.m.)

[390-a]

Tuesday, December 16, 1947, 10:00 o'clock a.m.

The Court: Proceed, counsel.

C. BRUCE FLICK,

resumed the stand.

Cross Examination—(Continued)

Mr. Rosenberg: Q. Mr. Flick, on Friday we were talking about the payment of this \$2.98 price, and I asked you if it was true that later in the year there was an agreement in letter form between the companies whereby Westvaco agreed that it would not avail itself of the escalator clause for a period of approximately a year, and you stated that that was true. I incorporated in my question the fact that as part of that agreement Pacific agreed that during that year period it would pay the \$2.98 price; that is correct, isn't it?

A. I believe that is correct.

Mr. Rosenberg: The other day Mr. Kaapcke read into the record, if the Court please, certain payments—this appears at page 256 of the transcript—apparently I haven't the correct transcript reference here.

The Court: Counsel has it.

Mr. Kaapcke: I have "256" noted here. I did not check your transcript. I checked the figures you wanted to put in the record.

Mr. Rosenberg: At any rate, at some point in the transcript [391] counsel read off the payments that had been made by Pacific to Westvaco. During the latter period of 1946 certain payments had been made at the price of \$3.76 a ton, and then I think three payments that had been made at \$4.48



(Testimony of C. Bruce Flick.)

a ton. I called counsel after Court, or called him Saturday, rather, and directed his attention to the fact that in connection with those payments that we made at the price of \$4.48 per ton, prior to the commencement of this action, that Westvaco had made a refund by way of a credit memo. to Pacific at the rate of 12 cents a ton on all of those payments that were made prior to suit at the price of \$4.48 a ton; so that the net result is that rather than having paid at the rate of \$4.48 per ton, Pacific paid at the rate of \$4.36 per ton.

Mr. Kaapcke: That is correct.

Mr. Rosenberg: That arises out of this fact, your Honor, that, as has been stated, since the commencement of the action Pacific has found that it made an error of 12 cents per ton, whereas in our answer we set forth we are entitled to \$4.48 a ton. We have conceded we are entitled only to \$4.36 per ton. Therefore, since the suit was commenced we refunded to Pacific 12 cents per ton on all shipments for which they paid the price of \$4.48 per ton.

Mr. Bennett: That is right. I think there was a slight inadvertence. I think you said Pacific discovered that it made an error. [392]

Mr. Rosenberg: No, Westvaco discovered that it made an error, that is right, and that is the price we are claiming in this action, your Honor, \$4.36 a ton, although your pleading sets forth \$4.48 a ton.

Q. Mr. Flick, you have testified that under date of September 13, 1946, Pacific transmitted two let-

(Testimony of C. Bruce Flick.)

ters under the same date to Westvaco. Do you recall that?      A. Yes.

Q. I believe they are in evidence as Exhibits 11 and 12. I will show you what purports to be a copy of a letter written to you under date of September 23, 1946, by Westvaco Chlorine Products Company, signed by W. K. Wallace, Western Manager, and ask you if you received the original of that letter.

A. I received a letter dated September 23, 1946, from Westvaco, and this does look like a copy of it. I have the original.

Mr. Rosenberg: Do you have the original, Mr. Bennett?

Mr. Bennett: I do not know, but we will not raise the question at this time as to it not being the original, counsel.

Mr. Rosenberg: I offer this as defendant's exhibit next in order.

The Court: It may be admitted and marked.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit E.) [393]

Mr. Bennett: The purpose in offering this letter, Counsel, is merely to show the position stated or claimed by your client at the time this letter was written?

Mr. Rosenberg: That is right. This letter is dated September 23, 1946, addressed to Pacific Portland Cement Company, 417 Montgomery St., San Francisco, California, Attention: Mr. C. B. Flick:

(Testimony of C. Bruce Flick.)

“Gentlemen:

We have received two letters from you, both dated September 13, 1946, and both stating that they record an understanding between Pacific Portland Cement Company and Westvaco Chlorine Products Corporation.

This letter will advise you that neither of these letters outline an agreement which this Corporation has made with Pacific Portland Cement Company. In connection with the various statements made in these letters, we have the following comments:

Your First Letter dated September 13, 1946, being the Longer of the Two Letters:—”

Mr. Bennett: I think that letter was withdrawn, wasn't it, counsel?

Mr. Rosenberg: I think they are both in evidence as Exhibits 11 and 12.

Mr. Bennett: The second or shorter letter superseded the first. I did not recall that I offered the long one, because it was completely superseded.

Counsel is right. Both letters, the long one, which is superseded, being Plaintiff's Exhibit 11, and the shorter one that superseded Exhibit 11, being Exhibit No. 12, are in evidence. I was mistaken in my recollection.

Mr. Rosenberg: (Continuing reading):

“1. Sacking Gypsum

We agree with you that we have had an agreement with you for the sacking of gypsum which was extended to August 31, 1946, and that the

(Testimony of C. Bruce Flick.)

agreement with you for sacking gypsum, as extended, expired on August 31, 1946. We further agree that we have no interest in sacking small quantities of gypsum for you and that effective August 31, 1946, we had no gypsum deliverable to you under our contract of January 29, 1937.

“2. Price of Gypsum

We agree with you that by letter dated July 24, 1945, it was agreed between the two corporations that the price at which this Corporation would sell to your Corporation, and your Corporation would buy gypsum until July 31, 1946, under our contract of January 29, 1937, was Two and 98/100 (\$2.98) Dollars per ton, F.O.B. plant, and that the so-called escalator clause in said contract which contemplates change in the price of gypsum from time to time should not be operative at any time before July 31, 1946. We further state that said agreement provided, in addition, [395] that after July 31, 1946, said escalator clause should be fully operative in accordance with the terms of the contract. We deny that there is any agreement, oral or written, between Mr. W. K. Wallace of our Corporation and Mr. C. B. Flick of your Corporation to extend said agreement of July 25, 1945, with respect to the contract price for gypsum to September 4, 1946, or beyond July 31, 1946. Rather, we state that we have no additional agreement with you with respect to the price of gypsum for any period after July 31, 1946, and that after said date the contract price with respect to all gypsum

(Testimony of C. Bruce Flick.)

delivered to you is determined by our contract of January 29, 1937, except insofar as gypsum is subject to Government laws or regulations restricting the selling price. We further state that insofar as gypsum has been decontrolled by the Office of Price Administration, that the contract selling price until November 13, 1946, is Three and 76/100 (\$3.76) Dollars per ton, F.O.B. plant, and that thereafter the selling price of all such gypsum shall be Four and 62/100 (\$4.62) Dollars per ton, F.O.B. plant, in accordance with the letter of W. K. Wallace to you dated September 13, 1946.

3. Deductions for Gypsum Below Specification.

We have no agreement with you with respect to deductions which you have made because of credits you have taken in [396] connection with so-called moisture credits. On the contrary, we assert that the deductions which you have made from our invoices are not authorized by the terms of the agreement dated January 29, 1937, and that the deductions you have made with respect to shipments of gypsum made after September 8, 1944, are not authorized by the express terms of the agreements dated September 8, 1944, and July 25, 1945.

4. Right to Refuse in Excess of Two Thousand Tons in Any Month.

In answer to the above-entitled paragraph in your letter, we agree with you that in any calendar year in which you do not exercise your right to refuse to purchase and accept in excess of twenty thousand tons of our gypsum production for the succeeding calendar year, that you are bound to



(Testimony of C. Bruce Flick.)

purchase our entire production of gypsum deliverable to you in such year when offered to you in approximately equal monthly installments.

Your Second Letter Dated September 13, 1946, Being the Shorter of the Two Letters.

1. Bagging Gypsum.

Our comments with respect to this paragraph in your letter which substantially restates the first paragraph of earlier letter are set forth above.

2. Price of Gypsum.

In connection with this paragraph in your letter, we do not agree with the averments made by you and our contentions [397] with respect to these statements are set forth above. We note your comments with respect to the price to be charged you for the gypsum delivered to you under our contract of January 29, 1937, and this will advise you that we will charge you the contract price of Three and 76/100 (\$3.76) Dollars per ton, F.O.B. plant, for all gypsum delivered to you until November 13, 1946, and thereafter will charge you Four and 62/100 (\$4.62) Dollars per ton, F.O.B. plant, for all such gypsum, in accordance with the terms and conditions of our agreement with you, and our notice to you dated September 13, 1946. We do not understand your comment with respect to the use of the price of Three and 76/100 (\$3.76) Dollars as a base for upward adjustment of the price of gypsum in the future under paragraph 6 of our agreement and state that we will determine the selling price of gypsum in accordance with the terms and conditions of the agreement. We

(Testimony of C. Bruce Flick.)

further state that we do not recognize any right in you in question at this time the price of Three and 76/100 (\$3.76) Dollars per ton currently payable by you under the contract. You have the right to inspect our books of account and records showing the production cost of gypsum to confirm the correctness of the advance in price of eighty-six (86c) cents per ton, making an aggregate purchase price of Four and 62/100 (\$4.62) Dollars per ton, F.O.B. plant, [398] payable by you for gypsum delivered on and after November 13, 1946.

It is our belief that the differences which exist between us should be settled amicably. However, in connection with such a settlement, we demand payment of all amounts due us by reason of the unauthorized deductions you have made from our invoices. We stand ready to meet with you at any time in an effort to work out a fair and equitable settlement of the differences which exist. However, neither of the two letters which you have submitted to us dated September 13, 1946, represent a satisfactory settlement as far as this corporation is concerned.

“Yours very truly,

Westvaco Chroline Products  
Corp.

By W. K. Wallace,  
Western Manager.”

Q. It was following the receipt of that letter that you sent Mr. Bannard to Newark for the pur-

(Testimony of C. Bruce Flick.)

pose of inspecting the records and determining the correctness of the 86-cent price increase, is that correct, Mr. Flick?

A. I sent Bannard to Newark to look at Westvaco's figures, get information, and come back and report to me. He did not go to Newark for the purpose of questioning the 86 cents.

Q. He did, however, prepare this work sheet which has been introduced in evidence as Defendant's Exhibit D, did he not?

A. May I see the work sheet? [399]

A. Yes, Bannard prepared the work sheet.

Q. On this work sheet he compared the periods July, 1944, to June, 1945, with July, 1945, to June, 1946, is that correct?

A. Yes, he shows the figures for those periods.

Q. What he did is set forth in the left-hand column the various items of cost of production of gypsum as shown in the records of Westvaco, did he?

A. I understand that is what he did.

Q. And then in the first column for each period he put the figure in there, "per Westvaco," did he?

A. That is correct.

Q. In the second column he put "adjustment," is that correct?

A. Correct.

Q. And in any instance in which he disagreed with the item he put in the amount he figured it should be, is that right?

A. I wouldn't say where he disagreed, no.

Q. What do you mean by "adjustment"?

(Testimony of C. Bruce Flick.)

A. Those adjustments which appear here are adjustments which were obvious, which should be made without any question of going into the fundamental correctness or incorrectness of Westvaco's accounting methods. These are adjustments which would be obvious, no matter what general accounting method was followed by Westvaco. Do I make it clear?

Q. Let me see if I can make it clear. At any rate, the items that appear in the second column headed "Adjustment" are items [400] which he in his opinion felt should be adjusted, is that right, whether exclusive or not?

A. The adjustments which appear there are items which Bannard felt should be adjusted.

Q. And then in the third column, which is headed "As adjusted," is the final figure, and in the cases which there is nothing in the second column he repeats the Westvaco figure in the first column, and where he has made an entry in the second column under the heading "Adjustment," he has adjusted the figure in the third column accordingly, is that right?

A. That is right. The third column, which is headed, "As adjusted," represents Westvaco's book figures with those particular adjustments which appear here, again without questioning the basic accounting methods or principles. I do not know if I make myself clear on that.

Q. I think the sheet is clear.

A. For example, if you look at my sheets for

(Testimony of C. Bruce Flick.)

1943 you will find no adjustments. That does not mean I accepted all of Westvaco's figures.

Q. You had no claim for adjustments on your sheets, did you?           A. No.

Q. Is this true——

A. I just do not want anything read into an ordinary audit work sheet, that is all.

Q. I am not reading anything into this, Mr. Flick, I assure [401] you. I am going to read just what is on the face of it. In the third column he has, "Increase or decrease per ton," and then he has in column 1, "Per Westvaco," No. 2, "As adjusted, No. 3, "Adjustment." Is that right?

A. Yes, that is just the subtraction.

Q. It is a recapitulation?

A. Just a subtraction of the first two columns.

Mr. Rosenberg: When I was asked the other day what the purpose was of offering that, I stated that there was no adjustment made in general overhead on this sheet, and Mr. Bennett took exception to that. He said that that was not true, and that there was nothing on the sheet to show that.

Q. I will ask you if it is not true that under the item, "General overhead," that in this final column it shows, "Increase per Westvaco 7 cents, adjustment"——           A. 7 cents?

Q. And the amount of adjustment nothing, is that right? In other words, he made no adjustment in general overhead, did he?

A. He did. He wiped out the 7 cents.

Q. He did wipe out the 7 cents?           A. Yes.



(Testimony of C. Bruce Flick.)

Q. How much has he got in the column "Adjustments"?

A. In the column "Per Westvaco" 7 cents. Westvaco showed an increase from 37 cents to 44 cents. [402]

Q. That is right.

A. Or an increase of 7 cents.

Q. Yes.

A. As adjusted 35 cents, 42 cents—no, that is correct. These figures do not reflect any adjustment.

Q. So the statement I made is correct, is it not, that on this sheet Mr. Bannard did not make any adjustment in general overhead expense—on this sheet, is that true?

A. Apparently it come out that way in the net total, but he has numerous adjustments in the detailed accounts comprising the general overhead.

Q. He does? A. Yes, sir.

Q. What adjustments has he got in items comprising general overhead?

A. Well, now, in these items which Westvaco listed as part of general overhead, the first adjustment is in Mine management, which in his adjustment column he threw out altogether.

The next adjustment is in an account for exploration, which he threw out altogether.

The next adjustment is in subscriptions and donations, which he threw out altogether.

Q. How much did he throw out for each of those three items you mentioned?

(Testimony of C. Bruce Flick.)

A. He threw out the amount which appears in each of these [403] two periods opposite Mine management. In the first accounting period there was \$311.08, and he wiped that out; and in the second accounting period there was \$549.60, which he wiped out. In the account called, "Exploration" in the first accounting period there was \$207.22, which he wiped out. In the second accounting period there was \$53.67, which he wiped out.

In the account, "Subscriptions and donations" in the first accounting period \$49.99, which he wiped out.

In the second accounting period, \$45.61, which he wiped out.

Q. (Mr. Rosenberg): Would this be true—

A. General plant expense—we will finish this—General plant expense, in the first accounting period \$2009.25. He added \$18.99 to that. And in the second accounting period \$1974.29, and he added \$82.90 to that. So that the total general overhead, summarizing all of those adjustments in the first accounting period, he deducted \$549.30, and in the second accounting period he deducted \$748.91. The net result of all those adjustments seems to be that they wiped each other out, so that when you get through there is apparently no net adjustments per ton.

Q. They wiped each other out, these items which are all deductions except the \$18.99; what you mean is they were in such nominal amounts they did not affect the per ton amount?

(Testimony of C. Bruce Flick.)

A. Well, I would say that the tonnage is not identical in those two accounting periods, and it just so happened the computation per ton turned out to be the same. [404]

Q. (Mr. Rosenberg): The statement is correct that the work sheet shows we claim a seven cent increase for general overhead and on Mr. Bannard's sheet he likewise showed seven cents for general overhead.

A. Well, I don't like to call that "claims" in connection with the audit work sheet, Mr. Rosenberg.

Mr. Rosenberg: I said he showed——

A. He showed just what we have been describing here last.

Mr. Rosenberg: I made reference the other day to a letter, Your Honor. I would like to offer it in evidence. I will offer in evidence at this time, if Your Honor please, a letter dated November 24, 1947, which is a copy of a letter written on the stationery——

Mr. Bennett: Just a minute. Before you introduce it, counsel, I want to see it. I don't see the relevancy at the moment. May I ask before the Court rules on the admissibility of this particular document, one written on November 24, 1947, to Pillsbury, Madison & Sutro, a letter written after the suit was filed, Your Honor, may I ask counsel's purpose for the offer?

Mr. Rosenberg: Yes. The purpose is this, that in the course of colloquy between Court and coun-

(Testimony of C. Bruce Flick.)

sel the other day, the Court was inquiring as to what information had been furnished to Pacific and what information had been withheld, and the witness testified to the fact that he had prepared these blank [405] worksheets and that they had been submitted to the attorneys for the defendant and the information had been inserted on the sheets and then they were returned to the attorneys for the plaintiff, and this is merely the letter of transmittal, if the Court please, showing the circumstances and conditions under which those figures were furnished. It is a letter from my office to the defendant's office. I don't know what objection there should be to having it go in.

Mr. Kaapcke: I would like to make an explanatory statement or a preliminary statement in that connection, Your Honor. Mr. Rosenberg said his purpose was to show the conditions under which this transmittal was made. I don't want to go into the matter of these motions. I think we have talked about them at great length and there is no necessity to discuss them further, but this unilateral declaration which Mr. Rosenberg makes of the conditions on which he furnished this information is certainly not consistent with the facts and I am sure Mr. Rosenberg will not assert that at any time I told him that our receipt of this information would be conditioned upon our relinquishing any right to go into further or subsidiary data. As a matter of fact, I at all times, and I think that every conversation referred to the possibility to

(Testimony of C. Bruce Flick.)

preserve our rights to go into the underlying data if in the eventuality of other issues of this suit as they were framed were decided, it should be necessary for a further examination to be made. If the [406] record is to show this letter indicating the conditions that Mr. Rosenberg had in mind in transmitting this information, I believe the record should also show my statement of the basis upon which this information was requested from Mr. Rosenberg.

The Court: Did you write a letter in answer to it?

Mr. Kaapcke: No, I did not write a letter in answer to it, Your Honor. I would be very glad to if it had seemed necessary but it seemed unnecessary for me to engage in a running battle with Mr. Rosenberg as to what we had said at different conversations and this case was in preparation and it seemed to me that was a matter of no great importance at the time. It certainly did not require my engaging in dispute with him about it.

The Court: What is the difference between you now? Is there any doubt about the actual situation?

Mr. Rosenberg: I don't think so.

Mr. Bennett: Your Honor, what is the purpose of this letter? It is not evidence; it is a self-serving statement.

The Court: Well, in the interest of time I will allow the letter. Let's clear it up.

(Letter of November 24, 1947 to Pillsbury, Madison & Sutro was marked Defendant's Exhibit F in evidence.)



(Testimony of C. Bruce Flick.)

Mr. Rosenberg: This is a letter, the original was written on the stationery of Bacigalupi, Salinger & Elkus to Pillsbury, Madison & Sutro re this case, attention of Mr. Kaapcke. It is dated November 24, 1947: [407]

“Gentlemen:

“I am enclosing herewith one set of the accounting information compiled by Westvaco Chlorine Products Corporation on the form sheets submitted by Pacific Portland Cement Company.

“Inasmuch as this data was furnished on condition that it would satisfy your Motion for inspection, would you kindly inform the Clerk to take the Motion off the calendar and advise me when this has been done.

“Very truly yours,

“Claude N. Rosenberg.”

The Court: It is time for recess. We will take a recess.

(Recess.)

Q. (Mr. Rosenberg): Mr. Flick, in your deposition the other day I understood you to say——

Mr. Bennett: Deposition?

Mr. Rosenberg: In your testimony the other day I understood you to say that you were willing to concede that depreciation was a proper item to include in the cost of production of gypsum but you objected, if I understand you, to the method by which the depreciation was computed; is that right?

(Testimony of C. Bruce Flick.)

A. Yes, that is correct. May I, just before we proceed, I would like to clear up just one matter we were discussing just before the recess in connection with this work sheet, of Mr. Bannard, and before we leave that and get involved in other subjects. That work sheet did not purport to represent Mr. [408] Bannard's position with respect to the inclusion of items on those work sheets. I have already testified that Mr. Bannard approved the letter of November 4, 1946, which expressed our position. I just don't want to leave that under any misapprehension.

Q. Going back to depreciation again, as I understand it, your objection was to the use of the straight line method of depreciation; is that right?

A. That is correct.

Q. Now, were you informed at the time you made your examination of our records that the depreciation had been computed on a straight line basis ever since this plant was constructed in 1937?

A. I was told that the depreciation was on a straight line basis on January 14, 1944, by Mr. Cuneo, and I was also told that in general the accounting method had been followed since the outset.

Q. Then you were in effect informed that the depreciation had been computed on that basis ever since the plant was constructed in 1937; is that right?

A. Yes, that is what I was informed in effect.

(Testimony of C. Bruce Flick.)

Q. Then what is your position on that at this time? Are you suggesting that we make a change in that method and we should have changed to the method of computing depreciation somewhere along the line? [409]

A. What I have pointed out and tried to explain in some detail is that the straight line method of depreciation gives you a result where your tonnage fluctuates from one year to the next which may show an apparent or bookkeeping increase which is not an actual advance in the cost of manufacture.

Q. In understand the basis of your objecting, but assuming that that method of computing depreciation had been used by Westvaco ever since the plant was constructed in 1937 and then when you came to check the figures on cost of production of the period July, 1944 to June 30, 1945 as compared to July 1, 1945 to June 30, 1946, it would be your thought that we should change for the next period the method of depreciation charge that we had been using for a period of years before that?

A. My thought has always been that Westvaco should not apply for the purpose of computing actual advance in cost of manufacture accounting methods which were included in its national uniform accounting system, but that Westvaco should keep accounts for the purpose of the contract which would reflect actual advance in cost of manufacture.

Q. Having kept their depreciation charges on that basis for a period of seven years, then would

(Testimony of C. Bruce Flick.)

it be your view that for the purpose of your cost figures for 1944-'45 as compared to 1945-'46 they should use a different method?

A. I have said that in order to get a true comparison for any two twelve month periods the accounting method must be uniform [410] for those two twelve month periods. Now, I think what Westvaco should have done, let's take 1942-'43. I think they should have computed their depreciation on a production basis for 1942 and also for 1943.

Q. And had they done that, then they would have had to adjust all of their other depreciation accounts likewise, wouldn't they?

A. No, they would not have had to adjust any of their other accounts. They would only have had to make a computation for the accounts for the contract.

Q. I see. Now, with reference to these moisture credit deductions and having in mind particularly the sum of \$514 that Westvaco had been claiming for erroneous chargebacks from the period 1940 to '44 because of what you state was a clerical error made by a clerk, or clerical errors that were made by a clerk in your accounting department, when did you first learn about that situation?

A. I think that there is a confusion because the \$514 amount happens to be coincidental to one somewhere near, the other amount of \$525, or whatever it was, for which we tendered a check. I don't believe those two things are related, Mr. Rosenberg.

(Testimony of C. Bruce Flick.)

Q. Let me ask you when you first found out about the \$525 item.

A. I have already testified as to that. After the suit was [411] filed, Mr. Kaapcke was going over some questions with me and wondered whether we had made any deductions on account of impurities and——

Q. When was that that Mr. Kaapcke got in touch with you?

A. When was the suit filed, February? It was some time after the filing of the suit, as I remember it.

Q. Do you recall how long?

A. It is difficult to recall exactly. We were going over a lot of these things after the suit was filed.

Q. Do you recall having received a statement on December 31, 1946, for these chargebacks in the sum of \$514.91 covering the period from December 31, 1940 to September 8, 1944?

A. I had several statements on chargebacks and I repeatedly invited Mr. Wallace to show me any instances where he thought we were wrong and I said I would be glad to check it and if we were wrong that we would make it right.

Q. Was it in pursuance to that declaration that on December 31, 1946 you were sent a statement showing these chargebacks in the sum of \$514.91 for the period I just mentioned?

Mr. Bennett: Well, that has to do with an entirely different matter.



(Testimony of C. Bruce Flick.)

Mr. Rosenberg: No, it does not. It includes chargebacks that you have taken where the gypsum content was 95.51 per cent or more——

Mr. Bennett: Well, if you have a letter, why not show it [412] to the witness?

The Witness: I have had various statements and assertions from Mr. Wallace during the latter part of 1946 and I had asked him repeatedly to show me where we were wrong and I would be glad to check it and correct it.

Mr. Rosenberg: I will skip that for the time being.

Mr. Bennett: Well, I have no objection to the letter.

Mr. Rosenberg: Well, that's all right. I will skip it for the time being.

Mr. Bennett: I think that refers to an entirely different matter.

Mr. Rosenberg: Well, it does not, Mr. Bennett; I am quite sure.

Q. With reference to shipping expense, if I understand your testimony that you gave the other day, you conceded that direct shipping expenses would be a proper item to include in the cost of production but you object to indirect shipping expense; is that correct?

A. That is substantially correct. I pointed out the cost of production, if you want to be strict about the word, cost of manufacture does not include shipping, but in so far as we were concerned under the contract with a price f.o.b. cars that we

(Testimony of C. Bruce Flick.)

were quite willing to say that that is included in the term cost of manufacture, the cost of putting it on the cars. I was quite willing to accept the direct charge as being [413] shipping cost of getting that gypsum onto the cars, but we are not willing to accept charges which represent theoretical allocations of so-called indirect shipping expense; for example, demurrage.

Q. Well, I take it that your answer to my question is yes, is it, that you concede that direct shipping expense may properly be included but you dispute that indirect shipping expense may be included? A. Correct.

Q. Will you explain to the Court what you mean by indirect shipping expense?

A. I am referring to the Westvaco, what Westvaco calls indirect shipping expense. Westvaco included in indirect shipping expense demurrage, shipping foreman, shipping foreman assistant, shipping clerk, warehouse labor, allocating tractor expense, labor for tractors.

Q. In other words, those are expenses that occur in the conduct of a shipping department but which can't be directly allocated to the various products that are being handled in the shipping department; is that true?

A. All I can say is their shipping expenses which have been allocated to gypsum formerly on the basis of the sales value of the gypsum in ratio to the sales value of other products shipped, and in the latest accounting period Westvaco changed

(Testimony of C. Bruce Flick.)

the method to allocate on the basis of tonnage. [414]

Q. I will ask you the question again. Is it correct that those are expenses which occur in the operation of a shipping department but which are allocated to various products handled because you can't charge them directly because you don't know how the time or the expense is directly divided as between the various products handled; isn't that correct?

A. I think that you have stated what Westvaco did.

Q. No. I am not asking you what Westvaco has done. I am asking if that is true. Is that true? Let me put it this way: If you have a shipping department and you have a number of employees in that shipping department and one of the employees is the superintendent of the shipping department and you are handling various products out of that shipping department, you would consider the superintendent's salary as an indirect expense because you don't know how much time he puts in in supervising the work in connection with a particular product; isn't that right?

A. You don't know how much time he puts in in shipping the by-product gypsum and therefore you should not allocate on a theoretical basis to the by-product gypsum.

Q. Let me ask about Gerlach, Nevada. You have a shipping department there.

A. Yes, four joint products.

Q. And you handle four joint products?

A. Yes. [415]

(Testimony of C. Bruce Flick.)

Q. And you have a superintendent or a foreman of your shipping department?

A. Correct.

Q. His expense is allocated as between the four products that are handled at the shipping department; is that it?

A. Correct.

Q. The reason for that is you don't know how much time he puts in in connection with the shipping of and supervision of each particular product; is that right?

A. That is correct.

Q. Let's assume that we had a separate shipping department for what you call by-product gypsum and we only handled gypsum in it. Then the superintendent's salary would be a direct charge rather than an indirect charge?

A. If he spent his time on the by-product gypsum and nothing else, I wouldn't object to it.

Q. You would not object to that?

A. No.

Q. You would not object to the assistant foreman if in a shipping department that was devoted exclusively to the shipping of gypsum you had a superintendent and a foreman, then their salaries would be direct expense and there wouldn't be any question that they would be properly included in shipping expense?

A. Yes, that is correct. That is entirely in line with what I [416] have said about by-product gypsum.

Q. So if I understand you, the basis of your objection, it is not that these charges are not really

(Testimony of C. Bruce Flick.)

and actually charges in connection with the operation of a shipping department, but because they took the allocations on the same basis, that is the basis of the objection?

A. If you discontinue shipping by-product gypsum, you would still have these charges for the assistant foreman and the others in a lesser and unascertainable amount and they should not be charged to the shipping of the by-product gypsum.

Q. In your Gerlach plant if you discontinued shipping or manufacturing any of these four products you make, you would still have your general expense of your shipping department either in the same amount or in some lesser or unascertainable amount; is that correct?

A. You would have your three remaining joint products.

Q. It is equally true, is it not, that in your Gerlach plant if you were handling four products and you discontinued the manufacture of a particular product you would still have a general expense and miscellaneous shipping expense or similar expense that you had before except that it might be less in amount, unascertainable amount, isn't that true?

A. Yes. That is not necessarily the difference between four products and by-products.

Mr. Bennett: Counsel, may I ask a question? Is it your [417] contention—

Mr. Rosenberg: You know, every time I have interrupted you you have objected, Mr. Bennett, but I have not objected. What is the question?



(Testimony of C. Bruce Flick.)

Mr. Bennett: I thought we would save time on all this testimony. I want to know whether it is your position that under accounting principles the same method should be used in accounting for by-products as is used for accounting for primary or main products.

Mr. Rosenberg: It is my contention that where you are handling a number of products in a shipping department, whether they are main products or a by-product, if you are going to determine the cost of shipping out a by-product, you do it upon the same sound principles as you do in any of the major products, that you do not saddle other products with the expense of a by-product. There is no magic in the term by-product. You have to pay your foreman to handle a by-product the same as you do a main product. Where you have a physical plant that handles the processing of a by-product and the shipping of the by-product, your expenses are there. There is no magic whether you call a by-product a main product of a main product a by-product. As I said the other day, where is the rationale, the philosophy, the logic of changing these accounts and real expenses merely by the magic of applying to the product the term by-product and saying it is not proper to apply these [418] expenses, they are not proper costs because you call it a by-product. Does that answer your question?

Mr. Bennett: As I understand your rather lengthy argument, it is yes, that you do not see any distinction or difference between cost account-

(Testimony of C. Bruce Flick.)

ing of a by-product and cost accounting of a main product.

Mr. Rosenberg: I don't draw any distinction between the cost accounting for gypsum in this complaint as related to bromine or any of the other 30 or 40 magnesia products that we make. [419]

Q. Mr. Flick, as you have stated before, you visited the plant over in Newark, is that correct?

A. Yes.

Q. Is this true, that the operation over there is largely an automatic operation: Most of the processes are handled by machinery, is that true?

A. I think that is true. It is quite well mechanized.

Q. What experience have you had in chemical plants? Have you had any actual experience in accounting for a chemical industry?

A. I have never been employed by a company that you would describe as a chemical company.

Q. Do you understand that is a common situation in chemical plants, that the operations are more largely automatic than in most manufacturing processes?

A. No, that is not unique with the chemical industry.

Q. Is this true, that in an industry where your manufacturing processes are largely automatic, as distinguished from manual, you would reasonably expect the indirect charges and overhead expense to bear a larger proportion or relation toward the total cost of production than you would in a process

(Testimony of C. Bruce Flick.)

where the manufacturing is largely labor or manual? That is obvious, isn't it?

A. Not necessarily, at all.

Q. Is it not?

A. No. If you mean by "indirect," if you include depreciation, [420] if you have a plant like a cement plant, which requires a great deal of heavy machinery and heavy capital investment, naturally you are going to have quite a large depreciation item, and repair and maintenance item, but the question of general overhead depends on lots of factors. It may depend, for example, on whether you have a type of business where you can sell in carload lots as compared with where you have to pack something and sell it in smaller lots, pack it in tin cans or maybe cases. There are lots of factors that may influence that. It depends altogether on the particular situation.

Q. Yes, but wouldn't you say as a general proposition that in a manufacturing process, where it is largely manual and therefore direct labor, you would have a larger percentage of your cost of production represented by direct charges than you would in a process that is essentially automatic? Do you disagree with that as a general proposition?

A. Well, I am afraid I cannot go along with a general proposition, because, I guess, it all depends on what you are making and the circumstances under which you are making it. I do not quite see the point of it.

(Testimony of C. Bruce Flick.)

Q. Let me ask you this: Among the items which Westvaco includes in overhead expense is laboratory and process control, is that right?

A. Yes.

Q. You feel that those are not proper charges to include in cost [421] of production do you?

A. I feel that you should not charge by-product gypsum any allocated portion of your laboratory or so-called process control, because if you quit making the by-product and dumped it in the bay, you would still have your laboratory and process control.

Q. And that would be true if we discontinued making one of our other products, too, wouldn't it?

A. Well, if you discontinued making magnesium oxide?

Q. Yes.

A. You would have no gypsum production.

Q. We would not?           A. Would you?

Q. I do not know. You are the witness, Mr. Flick, and you are telling me. Wouldn't we?

A. Well, I am not going to tell you what we might have.

Mr. Rosenberg: I suggest that the remark be stricken, if your Honor please.

The Court: It may go out.

Q. (Mr. Rosenberg): Let us take your Gerlach plant again. If you were conducting a laboratory over there for testing your products or improving your processes and you discontinued making one of the four products, you would continue to have your laboratory, wouldn't you?

(Testimony of C. Bruce Flick.)

A. Certainly.

Q. And those are joint products, aren't they?

A. Correct. [422]

Q. Were you informed that one of the functions of this laboratory is to make these tests of gypsum for the purpose of determining the gypsum content under the terms of the contract?

A. I assume that that is one of the functions.

Q. Is it your position that that is not a proper expense to include in the cost of producing the gypsum?

A. If you can actually ascertain what cost is incurred to test the gypsum, I would even be willing to admit that, although it is not strictly part of the cost of making the gypsum, manufacturing the by-product. But where you take your laboratory cost and then you assign a percentage of it to gypsum, merely because the gypsum labor payroll bears a certain relation to the total labor payroll, that is a purely hypothetical and theoretical allocation and is not properly good by-product accounting.

Q. But if you could get yourself to conceive that gypsum is a joint product rather than a by-product, then you would concede that that would be a proper charge, wouldn't you?

Mr. Bennett: It seems to me, your Honor, we are getting far afield here. This contract specifically states, your Honor, that it is a by-product, and a by-product, incidentally, resulting from the manufacture of the primary product. When that contract used those terms, we were entitled from



(Testimony of C. Bruce Flick.)

the life of the contract to understand the term "cost of manufacture of the by-product" to be the meaning which is commonly attributable to that. I do not know why we constantly get afield here on something else. I do not know whether counsel's purpose is to show that despite the contract declaration as to the character of the product, it is something else, and if that is his purpose I say it is all inadmissible, because he is bound by the contract and it would be asking the court not to construe the contract but to change it, and it seems to me we are getting far afield when we are dealing constantly with other situations. Now, if there is some purpose, counsel, to be served, other than an improper purpose of trying to establish that this is not a by-product, as the contract specifically states it is, why, I have no objection, assuming the court is willing to take as much time as you wish with this witness. But if the purpose is to establish that this is something other than a by-product, then I submit the defendants are bound by the express, unequivocal language of the contract, your Honor.

Mr. Rosenberg: I think I have stated my position. My position is clearly this, that whether or not gypsum is a by-product, from the chemical viewpoint, from an accounting standpoint it is entitled to the same accounting treatment as if it were a joint product. So I want to get this witness' views on what is proper accounting for a joint product.

The Court: Proceed.

Mr. Rosenberg: Will you read the question, Mr. Reporter?

(Testimony of C. Bruce Flick.)

(The last question was read by the reporter.)

Q. (Mr. Rosenberg): I am talking now about a portion of the [424] laboratory expense that is devoted to testifying the products, the proving processes, and things of that character.

A. If you had joint products, for your own purposes you can allocate on any basis you please. Where you have a contract involving somebody else, you have a different problem. The basis of allocation, even for your own purposes, should make sense, and you should not allocate merely for the sake of arithmetical convenience on one basis without relation to the nature of the thing you are allocating.

Now, laboratory expense allocated on a labor payroll basis does not make sense, unless you can establish that there is some relationship between the dollar of the labor payroll and the dollar spent in the laboratory.

Q. Would you say that allocation of laboratory expense on the basis of direct labor charges in the laboratory as related to total labor charges in the laboratory would be a rational basis of allocation?

A. If you keep track of the time of the chemists in the laboratory, then you no longer have any allocation problem, but you have a direct charge that you can make. You can ascertain that.

Q. Let us say when chemists work directly on a certain product, that they keep track of their time, and then when they are working on chemical processes generally in the plant, those charges are al-

(Testimony of C. Bruce Flick.)

located on the basis of the relation between the direct time [425] spent on a particular product, as related to the whole: Would you say that that would be rational?

A. Where you are talking about processes in the plant, there again you have a question of what processes and how they are related to the point of separation of your by-product or your joint products, for that matter.

Q. Let me ask you this, Mr. Flick, then: If I understand you, your objection to this charge is on the basis that it is allocated, is that right, rather than being direct?

A. Are you asking me as to joint products, or as to by-products?

Q. Let us assume that it is a joint product.

A. Joint products.

Q. Yes. Now, I will withdraw that. I believe you went so far as to concede that if we would have an accurate check on the time that is spent in analyzing and testing gypsum and working on the gypsum process to improve it, or to remove bugs, you would concede that that would be a proper charge?

A. You no longer have an allocation then. You have an ascertained direct charge.

Q. I did not say we had any allocation. I am speaking of a direct charge, now.

A. Correct.

Q. You would concede that that would be a correct charge, would you?      A. Correct. [426]

Q. Laboratory?      A. Correct.